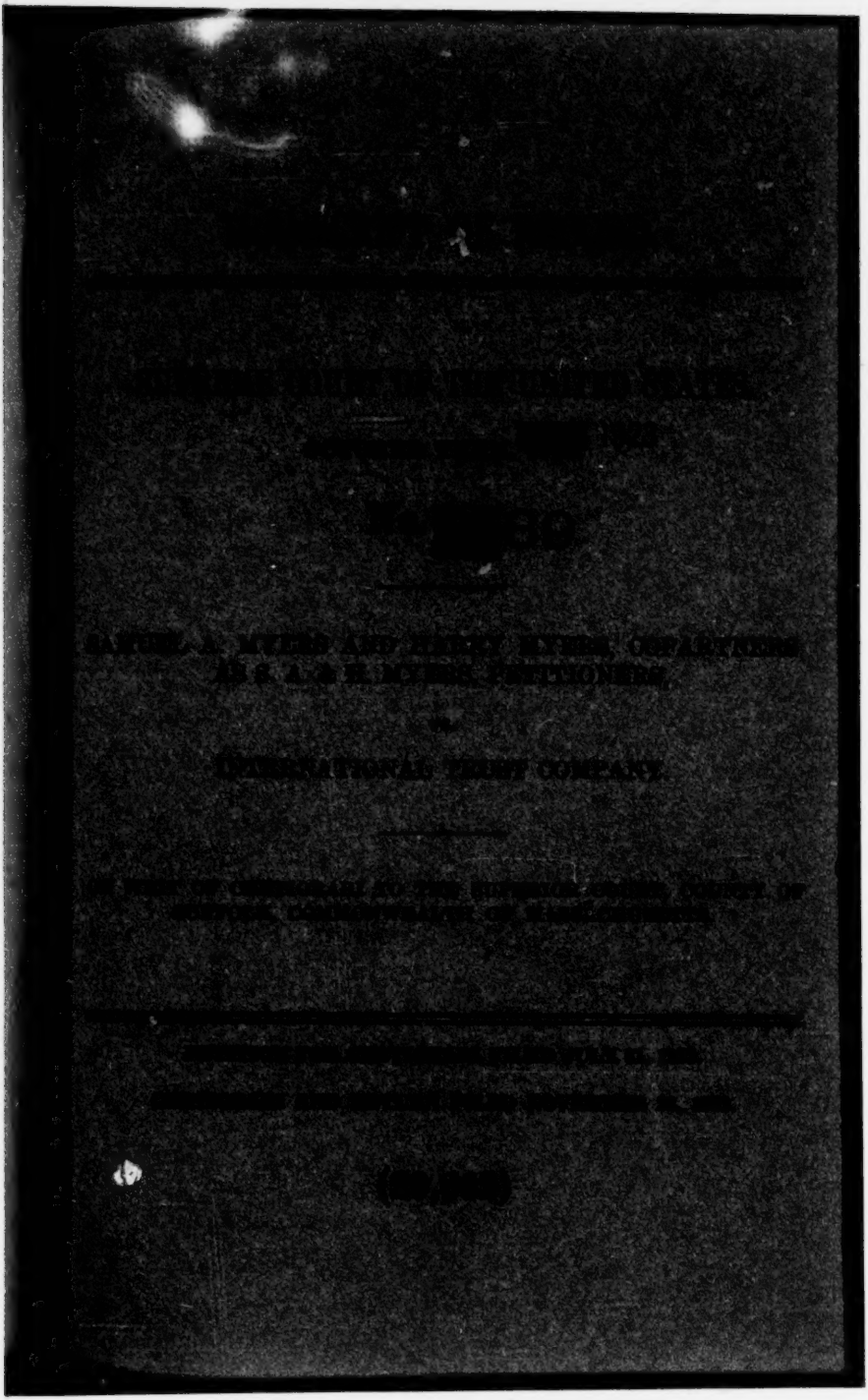


(29,062)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 512.

SAMUEL A. MYERS AND HARRY MYERS, COPARTNERS AS S. A. & H. MYERS, PETITIONERS,

vs.

INTERNATIONAL TRUST COMPANY.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

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a COMMONWEALTH OF MASSACHUSETTS:

I, Walter Perley Hall, Chief Justice of the Superior Court of the Commonwealth of Massachusetts, do certify, that Francis A. Campbell, Esq., whose signature is affixed to the papers hereunto annexed, is Clerk of said Superior Court, within and for the County of Suffolk, and hath the keeping of the files, records, and proceedings of said Court, within and for said County; Also, of the late Court of Common Pleas, within and for said County, and of the late Superior Court of the County of Suffolk, aforesaid; that he is, by Law, the proper person to make out and to certify copies of the files, records, and proceedings of said several Courts; that full faith and credit are and ought to be given to his acts and attestations done as aforesaid; and that his attestation to the papers hereunto annexed, being numbered one to fifty-eight inclusive, of the files, records, and proceedings of the said Superior Court is in due form.

In testimony whereof, I have hereunto set my hand and caused the seal of said Court to be hereunto affixed, this twenty-second day of July in the year of our Lord one thousand nine hundred and twenty-two. [Seal of the Superior Court.] Walter Perley Hall, Chief Justice of the Superior Court.

1 COMMONWEALTH OF MASSACHUSETTS,

Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our Superior Court for the said County of Suffolk, it is thus contained, the following being the entire record in the case.

COMMONWEALTH OF MASSACHUSETTS:

[SEAL.] *Suffolk, ss:*

To the Sheriffs of our Several Counties or their Deputies, Greeting:

We command you to attach the goods or estate of Samuel A. Myers of Boston in the County of Suffolk, and Harry Myers of Brookline in the County of Norfolk, carrying on business as a partnership in the name of S. A. and H. Myers to the value of twenty-five thousand Dollars, and summons the said defendants (if they may be found in your precinct) to appear before our Justices of our Superior Court, to be holden at Boston, within and for our said

County of Suffolk, on the first Monday of December next,

2 then and there in our said Court to answer unto International Trust Company, a corporation organized under the laws of Massachusetts and having a usual place of business in Boston in an action of tort.

3 To the damage of the said plaintiff (as it says) the sum of twenty-five thousand Dollars, which shall then and there be made to appear, with other due damages. And whereas the said

plaintiff says, that the said defendants have not, in their own hands and possession, goods and estate to the value of twenty-five thousand Dollars aforesaid, which can be come at to be attached, but have intrusted to and deposited in the hands and possession of the First National Bank and in the Commonwealth Trust Company, corporations organized under the laws of the Commonwealth of Massachusetts and having usual places of business in Boston Trustee- of the said Defendant- goods effects and credits to the said value: We command you, therefore, that you summon the said supposed Trustee (if he may be found in your precinct), to appear before our Justices of our said Courts, to be holden as aforesaid, to show cause, if any, they have why execution to be issued upon such judgment as the said Plaintiff may recover against the said Defendant in this action (if any) should not issue against defendants' goods, effects, or credits, in the hands and possession of the said Trustee-.

And have you there this writ with your doings therein.

Witness, John A. Aiken, Esquire, at Boston, the sixth day of November in the year of our Lord one thousand nine hundred and seventeen. Francis A. Campbell, Clerk.

On which said writ return of service and acceptance of service were made in the words and figures following, to wit:

4 "SUFFOLK, *ss:* Boston, November 8th, 1917.

By virtue of this writ, I this day at fifty-five minutes past one o'clock P. M., summoned the within named trustee corporation, Commonwealth Trust Company, to appear and show cause at Court as within directed, by delivering in hand to S. W. Holmes Esq., its Vice President and the Officer in charge of its business an attested copy of this writ, and on the same day at six minutes past two o'clock P. M., I summoned the within named trustee corporation the First National Bank of Boston, to appear and show cause at Court as within directed, by delivering in hand to E. W. Owens Esq., its Assistant Cashier and the officer in charge of its business, an attested copy of this writ, and on November 9th, 1917, I attached a chip as the property of the within named defendants, Samuel A. Myers and Harry Myers, and afterwards on the same day I summoned each of said defendants to appear and answer at Court as within directed, by delivering in hand to Samuel O. Reinstein, Esq., their attorney, an attested copy of this writ for each, he accepting service for each as appears by his endorsement hereon. Henry G. Gallagher, Deputy Sheriff."

Fees:

Services	$4.00
Copies	4.00
Travel	.10
	$8.10

"SUFFOLK, *ss:*

Boston, November 9th, 1917.

Due and sufficient service of the within writ is hereby accepted for the within named defendants Samuel A. Myers and Harry Myers. Samuel O. Reinstein, Attorney for Defendants."

5 The above entitled action was filed and entered in this Court on the first Monday of December, A. D. 1917, when and where said Plaintiff appeared by John R. Lazenby, Esquire, its attorney, as aforesaid.

[Endorsement omitted.]

COMMONWEATH OF MASSACHUSETTS,
[SEAL.] *Suffolk, ss:*

Superior Court.

INTERNATIONAL TRUST COMPANY

vs.

SAMUEL A. MYERS; THE FIRST NATIONAL BANK OF BOSTON et al., Trustees.

ANSWER OF THE FIRST NATIONAL BANK OF BOSTON, TRUSTEE.

[Filed Dec. 3, 1917.]

Now comes The First National Bank of Boston, summoned as trustee in the above entitled cause, and appears by B. D. Blaisdell, its cashier, who for answer says that at the time of the service of the plaintiff's writ upon the bank, on November 6, 1917, it had in its possession and control funds to the amount of fifteen hundred eighty-three dollars and twenty cents ($1,583.20), and no other goods, effects or credits, belonging to the defendant. The First National Bank of Boston, by B. D. Blaisdell, Cashier.

6 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

December 4, 1917.

Then personally appeared the above named B. D. Blaisdell, to me known to be the cashier of The First National Bank of Boston, and made oath that the foregoing answer by him subscribed is true to the best of his knowledge, information and belief.

Before me, Frederick W. Eaton, Justice of the Peace.

[Endorsement omitted.]

[Title omitted.]

APPEARANCE.

[Filed Dec. 4, 1917.]

[Title omitted.]

In the above action we appear for the First National Bank of Boston, Tr. Blodgett, Jones, Burnham & Bingham, 60 Federal Street, Boston.

7 [Endorsement omitted.]

[Title omitted.]

APPEARANCE.

[Filed Dec. 6, 1917.]

[Title omitted.]

In the above action we appear for the defendants. Julius Nelson, Samuel O. Reinstein, 18 Tremont St., Boston.

[Endorsement omitted.]

[Title omitted.]

JURY CLAIM.

[Title omitted.]

In the above action we claim a trial by jury. Julius Nelson, Samuel O. Reinstein, Attorneys for Defendants.

8 [Endorsement omitted.]

[Title omitted.]

ANSWER OF ALLEGED TRUSTEE.

[Filed Dec. 11, 1917.]

And now the Commonwealth Trust Company Corporation summoned as trustee of the principal defendants in the above-entitled action, appears by A. R. Smith its Assistant Treasurer, and makes answer that at the time of the service of the Plaintiff's writ upon the said corporation, it had not in its hands or possession, any goods, effects or credits, of said defendants and of this the said A. R. Smith submits himself to examination upon his oath.

Wherefore the said corporation prays that it may be discharged, and for his costs. Commonwealth Trust Co., by A. R. Smith, Ass't Treas. December 11th, 1917.

Then the above-named A. R. Smith made oath that the foregoing answer subscribed by him is true, before me, Charles R. Clason, Notary Public.

9 Endorsed on said answer was the following, to wit: "Gaston, Snow & Saltonstall for Alleged Trustee."

[Endorsement omitted.]

[Title omitted.]

DEFENDANTS' ANSWER.

[Filed Dec. 29, 1917.]

Now come the defendants in the above entitled cause and for answer deny each and every statement and allegation in the plaintiff's writ and declaration contained. By their Attorney-, Julius Nelson. Samuel O. Reinstein.

[Endorsement omitted.]

10 Thence the case was continued from time to time unto the twenty-seventh day of March, 1919, when, on said day, said Defendants filed their amended answer.

11 [Title omitted.]

APPEARANCE.

[Filed June 2, 1919.]

[Title omitted.]

In the above action we appear for the defendants Myers. Dunbar, Nutter & McClennen.

[Endorsement omitted.]

[Title omitted.]

APPEARANCE.

[Filed Dec. 7, 1920.]

[Title omitted.]

In the above action we appear for Plaintiff. Hale and Dorr, 60 State St., Boston, Mass.

[Endorsement omitted.]

12 [Title omitted.]

VERDICT.

[Filed March 2, 1921.]

The Jury find for the Plaintiff, and assess Damages in the sum of Fourteen thousand three hundred and four and 49/100 Dollars $14,304.49. John F. Snyder, Foreman of the Jury.

[Endorsement omitted.]

[Title omitted.]

MOTION FOR THE EXTENSION OF TIME FOR FILING BILL OF EXCEPTIONS.

[Filed March 18, 1921.]

Now come the defendants in the above entitled cause and move that the time for filing their bill of exceptions be extended
13 until May 1st., 1921. By their attorneys, Dunbar, Nutter & McClennen.

Assented to. John R. Lazenby, Attorney for Plaintiff.

Endorsed on said motion is the following, to wit:

"SUFFOLK, *ss:*

Superior Court.

Boston, Mch. 18, 1921.

SISK, *J.:* Allowed by the Court by consent.

Attest: H. E. Bellew, Asst. Clerk." [Seal of the Superior Court.]

Thence the case was continued unto the twenty-eighth day of April, 1921, when on said day, said Defendants proposed exceptions.

[Endorsement omitted.]

[Title omitted.]

MOTION FOR EXTENSION OF TIME FOR PRESENTING AND ALLOWANCE OF BILL OF EXCEPTIONS.

[Filed June 23, 1921.]

Now come the defendants and move that the time for
14 presenting their bill of exceptions to the presiding justice for allowance and allowance by him, be extended until October 1st., 1921. By their attorneys, Dunbar, Nutter & McClennen.

Assented to: Hale and Dorr, Attorneys for Plaintiff.

Endorsed thereon is the following, to wit: "June 23/21. Mo. granted. H. A. D., J. S. C."

Thence the case was continued unto the twenty-ninth day of July, 1921, when on said day, Notice was sent to all attorneys and to Dubuque, J., under Rule 54.

Subsequently, on the thirty-first day of August, 1921, said Defendants Exceptions, having been presented to the Court were allowed and signed by the presiding Justice, and are as follows, to wit:

15 [Title omitted.]

DEFENDANTS' BILL OF EXCEPTIONS (PLAINTIFF'S REDRAFT).

[Filed Aug. 31, 1921.]

Reference may be had to the pleadings in this case. The substance of the evidence introduced at the trial was as follows:

SAMUEL A. MYERS, one of the defendants, was called as a witness by the plaintiff and testified in substance as follows:

My brother, Harry Myers, and I are partners, conducting a partnership of S. A. and H. Myers. The partnership has been conducted in its present form for seven or eight years. It was formerly Myers and Andrews, which was formed in 1882 and dissolved in 1892 to 1896, and then formed again as Myers & Andrews. For the last seven or eight years my brother and I have been the sole partners. The business was the manufacture of boys' and youths' clothing. I was in charge of the manufacturing and financial end, and my brother was a salesman.

The partnership has dealt with the International Trust Company way back from the Myers & Andrews days, fifteen or more years, and continued to deal with them straight down through 1916. We kept our bank account there and borrowed money, and discounted notes of customers, although I am not sure of the last. When we wanted money from the bank we gave them a note. Once a year they would write and ask us for a financial statement of our business.

B. We gave the statement dated January 14th, 1910.

Statement was offered in evidence and admitted and marked Exhibit 1.

I sent the statement dated November 1st, 1911.

This statement was offered in evidence and admitted and marked Exhibit 2.

16 The statement of the second of December, 1912, is one of ours.

This statement was offered in evidence and admitted and marked Exhibit 3.

Also that of the first of December, 1913.

This statement was offered in evidence and admitted and marked Exhibit 4.

The statement of February 4th, 1914, was one of ours.

This statement was offered in evidence and admitted and marked Exhibit 5.

The plaintiff stated that these statements were not offered on the ground that they were false and no claim was made that they were false, but that they were offered as evidence showing the course of dealing prior to 1916, and a continuing representation down to the giving of the statement Exhibit 6.

Q. Mr. Myers: those statements were given to the Bank for what purpose?

A. What is that?

Q. Those statements were given to the Bank for what purpose?

A. Why, given to them on their request.

Q. And why were they given to them?

A. Why, because they asked for them.

Q. And why did they ask for them?

A. Well, I don't know—they asked for them.

Q. Mr. Myers, don't you know that they were trying to find out the condition of your business financially?

Mr. McClennen: Just a moment. That question as to these earlier statements I object to.

The Court: Well, it bears upon the question of reliance upon the statement that would be the subject matter of this suit more particularly. You see I admitted the course of dealings between the parties and then it will be a question whether owing to the course of dealings between the parties whether the plaintiff relied or acted upon the statement that they got or asked for.

Mr. McClennen: May I note an exception?

The Court: Yes, sir.

Q. Mr. Myers, don't you know they were trying to find out the condition of your business financially?

A. * * * I don't know what I am to do now.

Q. Answer the question, Mr. Myers.

A. What is the question?

Q. Don't you know that those statements were given to
17 the bank to enable the bank to determine what your financial condition was?

A. Well, I presume so, I don't know what was in their minds.

The statement dated March 27th, 1916, is one of ours. This statement was offered in evidence by the plaintiff and was objected to by the defendants on the ground that "it has been conclusively determined in the Bankruptcy Court that it is not a false statement."

The statement was admitted and marked Exhibit 6. (See copy of Exhibit 6 annexed to this Bill of Exceptions.) To the admission the defendants duly excepted and their exception saved.

The witness continued: This statement was prepared by the bookkeeper, Mr. Glass, at our instruction, and mailed to the International Trust Company at its written request. At the time of the writing we had not requested any loans. At the time the statement was made we were still dealing with the International Trust Company, depositing and getting loans when we called for them. During the latter part of 1916 we requested them to loan money and they made the following loans:

October 2, 1916	$2,000
November 2, 1916	2,000
November 10, 1916	2,000
November 13, 1916	2,000
December 1, 1916	2,000
December 8, 1916	2,000
December 11, 1916	2,000
December 13, 1916	2,000
December 15, 1916	2,000
December 18, 1916	2,006

The notes covering these loans were shown to the witness and introduced as evidence as Exhibit 7.

We got the money on those notes.

I do not know whether sometime in the summer of 1915 we had difficulty in raising money. We entered into an agreement with the Commercial Investment Trust, which agreement was dated 22nd July, 1915.

This agreement was offered in evidence by the plaintiff and marked as Exhibit 8. (See copy of Exhibit 8 annexed to this Bill of Exceptions.)

The item of accounts receivable in the statement of March 27th, 1916, Exhibit 6, $58,425.06, contained all the accounts receivable. It also contained all the accounts which we had assigned. It included the notes which we had assigned to the Investment Trust.

18 The general practice in dealing with this Investment Trust was that we ship merchandise, invoice it, take certain accounts, and send them a duplicate invoice, and they would loan us 80% on that invoice. You will have to ask the bookkeeper as to whether 2% was kept back. Whatever the contract was as to what we paid for that money we had to pay. It was at the rate of 12% per year.

When I gave the notes, Exhibit 7, to the Trust Company, I did not at any time tell them of this agreement with the Commercial Investment Trust, or that we were putting up our accounts receivable for money loaned to us. We kept the accounts on our books and collected them and remitted the money to New York for the amount which the Investment Trust had loaned to us. I don't know

whether 6% was paid and then 12%. The bookkeeper can tell about that. I understood the agreement before I signed it.

I did not know in my talks with the officers of the International Trust Company that the assignments of accounts was a material question to them. We dealt with the International Trust Company in 1903. I didn't know that way back at that time the question of assigning accounts was one of importance.

Application blank for credit was then shown to the witness.

The witness continued: I see on this application of the International Trust Company that it asked in 1903 whether any accounts were assigned, but I didn't pay any attention to that at that time. I answered the question with a cross. We had not assigned any accounts at that time. In dealing with customers, we allowed discounts for prompt payment; 9% in ten days; 7% in sixty, and net accounts were paid after four months. I do not know how soon after we sent one of the invoices to the Commercial Investment Trust interest started to run. You will have to ask the bookkeeper.

The item notes payable in the statement, Exhibit 6, represents money borrowed, whether we gave a note for it or not. Accounts payable meant accounts owed by us for merchandise which we had bought. Accounts receivable meant accounts due us from customers for garments and clothing which we had sold and shipped to them. Merchandise in stock and in process of manufacture meant stuff which we had on hand.

On cross-examination, the witness, Samuel A. Myers, testified in substance as follows:

A letter dated March 22, 1916, from Henry L. Jewett, Vice-President of the International Trust Company, directed to S. A. & H. Myers, was shown to the witness.

This letter was the letter in response to which our statement, Exhibit 6, was sent.

19 The defendant then offered the letter in evidence. The plaintiff objected to the admission of the letter unless the enclosure referred to therein was produced and offered with the letter. The defendants stated that they did not have the form.

The court then suggested that the plaintiff produce one of the forms in use at the date of the letter, and that that form be put in evidence. Upon that understanding the plaintiff withdrew its objection. The form was later read to the jury and will be set out in full hereafter.

The letter dated March 22, 1916, from H. L. Jewett, Vice-President International Trust Company, to S. A. & H. Myers was admitted in evidence and marked Exhibit 9. (See copy of Exhibit 9 annexed to this Bill of Exceptions.)

The witness continued: When I received the request of March 22nd, I turned it over to our book-keeper and asked him to get out a statement as of the first of the year. The body of the statement is in

the bookkeeper's handwriting. I gave no directions to him. I believed that the statement was a true statement and signed it and mailed it.

Q. In the sending of this statement to the International Trust Company, or the making of it out, or in any other connection, did you have any intention to deceive the International Trust Company?

To this question the plaintiff objected. The court admitted the question, and the plaintiff excepted and its exception was saved.

A. No, sir.

The witness continued: I am not a bookkeeper, and am not familiar with accounts or accounting. My bookkeeper has been with me seven years, I think, and I believed him to be honest and competent. I believed that I could rely on any statement of my condition which he made out for me.

The witness was then examined by the plaintiff in redirect examination, and testified in substance as follows: I accepted whatever statement my bookkeeper, Mr. Glass, prepared, as if it were my own, and intended that anyone who saw it should rely on it as being accurate and true. I intended that the International Trust Company rely on it as being accurate and true. I gave it to them so that they would know our condition. I do not know whether there was a form in the letter, Exhibit 9. I read the letter.

HENRY L. JEWETT was called as a witness by the plaintiff and testified in substance as follows: I am Vice-President and Secretary of the International Trust Company; have been Secretary since 1879 and Vice-President for the last seven years. My
20 duties in relation to discounting notes are that I discount them judging from statements submitted to us as to the financial responsibility. I determine the financial responsibility of prospective borrowers on their own statements and often backed up by agency reports. We have had dealings with the Myers since 1903 in discounting notes, and have had business with them as depositors. In discounting notes, we determine whether we should discount upon their financial statement as rendered to us.

Exhibits 1 to 6 were shown to the witness.

These are the statements I used in giving credit to the Myers. Up to October, 1916, our experience with S. A. & H. Myers was apparently satisfactory.

The notes in Exhibit 7 were shown to the witness.

I passed on nine of these notes, but not on the note of December, 1916. I do not know who passed on that. I may have done that, but I don't know. Prior to October, 1916, I did not have any conversation with them as to the discounting of notes. When I discounted the notes in question, I relied upon the signed statement on file to determine whether credit should be given to the Myers. I did not limit it to one statement, but relied on those throughout a number of years. When I passed on the statements, I relied on the accounts receivable as having the ordinary and usual meaning in business.

Q. What is the ordinary and usual meaning in business?

To this question the defendants objected and stated, "That is, I would understand that accounts receivable in the ordinary course meant moneys due in the case of a merchant or manufacturer for goods delivered, sold and not yet paid for."

At the time the notes were presented I had no information that the Myers had assigned their accounts receivable to the Commercial Investment Trust. The Myers did not disclose in any form any information that they had assigned their accounts receivable. The statement in Exhibit 6 did not show that certain accounts receivable had been assigned.

Q. Whether or not the Myers informed you in any form that they were paying 16% to 18% interest for money which they were arising?

To this question the defendants objected.

The Court: * * * I will admit that subject to your exception.

Mr. McClennen: Save my exception.

The question was not answered.

Q. Whether or not you knew, Mr. Jewett, that the Myers were paying interest at the rate of from 16% to 18% for money which they were receiving—which they were borrowing?

A. I did not.

21 Q. Whether or not the statement disclosed, this statement, Exhibit 6, that fact in any form to you?

A. No, it showed accounts receivable in force.

Myers did not give me any information in regard to their paying at the rate of 16% to 18%. Otherwise, we would not have discounted those notes. I have had experience in discounting and banking, and my experience has been that when persons pay 16% to 18% for money, they are in a bad condition.

Q. Whether or not, Mr. Jewett, you would have advanced money to the Myers if you had known the fact they were paying 16% to 18% interest?

The question was admitted, subject to the defendants' exception, and the defendants' exception was saved.

* * * * * * *

Q. If you had known that the Myers were paying 16% to 18% interest for money which they received, would you have advanced any money to them?

A. Not a dollar.

Q. If you had known that they had executed any agreement like this of the 22nd of July to the Commercial Investment Trust, would you have loaned them any money?

Mr. McClennen: Save my Exception.

A. Would not.

The Court: Yes, I will save your rights on them.

* * * * * * *

Q. Whether or not you were misled in your opinion of the financial condition of these people by the failure of this statement, Exhibit 6, to disclose these facts relating to this assignment?
A. Decidedly.

Mr. McClennen: That I object to.
The Court: What is the objection?

* * * * * * *

I have some doubt about that as to whether a person can testify that he was misled, or whether it is not conclusion for the jury to pass upon.

Mr. Lazenby: It goes materially, your Honor, please, to the question as to whether the person who receives these statements relied on them; if he were not misled, he would not have relied upon them and consequently there would be no actionable fraud.

The Court: Well, if you are willing to stand the exception, I can stand it.

22 On cross-examination, the witness, Henry L. Jewett, testified as follows: Between the 1st of January, 1916, and the 1st of January, 1917, I did not have any conversation with the Myers. They merely brought in notes and I passed upon them just as ordinary and discounted them.

* * * * * * *

Harry Myers, one of the defendants, was called as a witness by the plaintiff, and testified in substance as follows: I have been a member of the firm of S. A. & H. Myers from its organization and before that was a member of the firm of Myers and Andrews. I was in the selling end and had nothing to do with the financial part. My brother had dealings with the International Trust Company, and I knew that fact and also that the firm was borrowing money from the International Trust Company from time to time. I left all financial matters in the hands of my brother and left also the preparation of all financial statements to my brother, who was in the office. I knew about the assignment of 22nd July, 1915 Exhibit 8, at the time it was made.

I discussed with my brother the subject matter of the assigned accounts. I think I knew that each year a statement was supplied to the International Trust Company. This was left in my brother's hands. From time to time I endorsed notes given to the Trust Company. I did not in the case of the note of November 2, 1916, but I

did endorse all of the other notes in Exhibit 7. I did not tell anyone at the International Trust Company of the execution of the assignment to the Commercial Investment Trust, and did not tell them of the rate of interest we were paying to the Commercial Investment Trust.

* * * * * * *

JOHN R. GLASS, a witness called by the plaintiff, testified in substance as follows: I am a bookkeeper and have been employed by the Myers since April, 1914; was in charge of their credits and collections. I did not know that the Myers had been in the habit of giving statements to the International Trust Company since 1910. I prepared the statement of March 27, 1916, Exhibit 9, and was told by Mr. S. A. Myers to prepare the statement.

Exhibit 9 was shown to the witness.

If a form came with this letter from the Trust Company, I haven't got it, if there was one enclosed. In consequence of this letter and the instructions of Mr. S. A. Myers, I prepared this statement, Exhibit 6. I knew that the firm was dealing with the Commercial Investment Trust. Interest was at the rate of 1/30 of 1% a day on the daily balance. That would average at the rate of 12% a year.

I could not say we have anything in the files that cancels this
23 agreement: "The first party shall pay the second party interest at the rate of 6% per annum upon every sum so advanced."

I did not pay any other interest. I did not pay 6% interest. All we paid was interest at the rate of 1/30 of 1% a day on the daily balance.

Q. This agreement provides, Mr. Glass, that you, that is, S. A. & H. Myers, shall pay the Commercial Investment Trust at the rate of 6% per annum upon every sum so advanced, and in addition thereto a reasonable compensation, and then it provides that reasonable compensation shall be ½% of the face amount of the first one hundred thousand of accounts assigned during twelve months succeeding the date hereof and during each twelve months period beginning with each anniversary of the date hereof, and also 1/30 of 1% of the face amount of all accounts for each day such accounts are held as collateral.

A. May I read that?

* * * * * * *

Q. You say that you never paid 6%—at the rate of 6%?

A. I am still of the impression that we only paid 1/30 of 1% a day.

At the time the statement of March 27th, 1916, Exhibit 6, was made, I think something like $27,000 of accounts receivable had been assigned as of January 1, 1916. The books show that on March 27th I should say we had assigned accounts to the extent of $46,441.13. The $46,441.13 was the gross amount representing 100% of the accounts assigned. That is, it represents the amount of the

invoices assigned. They were live accounts. On that date there had been assigned to that concern $46,000 worth on the face of accounts in excess of all accounts that had been paid by the customers up to that date.

The $27,000 worth that were assigned on January 1, 1916, appear in Exhibit 6 in accounts receivable of $58,425.06. We received on the $27,000 of accounts assigned 78%, that is, $21,058. The difference, $5,000 to $6,000, remained on our books and we received the money barring adjustments of interest and charges.

Q. The accounts payable here are $76,000 and some. You knew, did you not, Mr. Glass, what an account payable meant?

A. Money we owe.

Q. Money you owe for what?

A. Services, merchandise or——

Q. You knew the general accepted term accounts payable did not include what you had borrowed, did you not?

A. Well, it might not so be interpreted according to the ethics of accountants.

At the time the $27,000 worth of accounts receivable were assigned, the Myers had absolute control in collecting accounts.
24 The checks received on the collection of these accounts were by instruction to go to Commercial Investment Trust Company. I had not read the contract at that time. I knew the rate of interest from the Commercial Investment Trust auditor, who called every month to audit our accounts.

The money received from these assigned accounts was not an obligation to pay for merchandise.

The including of $26,000 among the accounts payable did not disclose the fact that we were paying 12% to 18% interest. The items notes payable of $59,713 did not include any of the money received from the Commercial Investment Trust. That item is a separate banking indebtedness of notes outstanding, to banks or individuals. It was so far back, I can't just remember the normal rate of interest on notes payable at that time. I know it was somewhere between 5½% and 6%.

On cross-examination, the witness testified in substance as follows:

According to our system of bookkeeping, when goods were sold to a customer and shipped out, an invoice was sent to the customer stating the amount of the shipment, and the amount of the invoice was charged on the ledger to that customer. The amount of the shipments for which we sent these invoices or bills, when added together, constitute accounts receivable on the ledger, and when a customer paid his bill the amount would be credited to the customer, and that would reduce by so much the outstanding accounts receivable. When we sent a duplicate of this bill or invoice to the Commercial Investment Trust they would send 80% less some percentage adjustments in cash, and this cash received was credited to the Commercial Investment Trust and will show on the books as so much money owed to the Commercial Investment Trust from which we had borrowed

that sum. I don't remember any other circumstances where we borrowed money.

In the case where we borrowed money and issued a note, the note was put under notes payable account. On January 1, 1916, according to my books, the amount of accounts payable then outstanding and unpaid was $76,102.72. The amount of notes payable was $59,713.12. The amount of merchandise in stock and in process of manufacture was $147,289.53. The amount of cash on hand and in the bank was $4,777.62. The amount of accounts receivable was $58,425.06. The amount of machinery and fixtures was $8,833.96. That made the total assets $219,326.17. Deducting accounts payable and notes payable, $83,510.33 was left as net capital. If I had left out of accounts payable all sums due the Investment Trust for money advanced, and had left out of accounts receivable the corresponding amount to that owed the Commercial Investment Trust, it would have left as net capital the same amount, $83,510.33. I followed the instructions of the Commercial Investment Trust in the way I kept those accounts. This method did not increase the assets over the liabilities.

When the letter of the International Trust Company of 22nd March, 1916, Exhibit 9, asking for a statement, was given me, I was not given any special instruction to make out the accounts in any particular way. When I made out the statement of March 27, 1916, Exhibit 6, I believed it was a true statement and I had no intention to deceive anybody. At the time this statement, Exhibit 6, was made, the amounts which appeared in accounts payable as due the Commercial Investment Trust on January 1, 1916, had more than likely been paid up. Accounts receivable were ordinarily paid within sixty to ninety days. On March 27, 1916, the amount owed to the International Trust Company included the following notes:

Note issued February 26, 1916, four months	$2,000
Note issued February 28, 1916, four months	2,000
Note issued March 8, 1916, four months	2,000

making a total of $6,000 owed at that time. Between March 27, 1916, and the date of the first unpaid note, that is, October 2nd, 1916, the following additional notes due them were paid:

Note issued March 30, 1916, four months	$2,000
Note issued May 10, 1916, four months	2,000
Note issued June 26, 1916, four months	2,000
Note issued June 28, 1916, four months	2,000
Note issued July 10, 1916, four months	2,000
Note issued July 18, 1916, for thirty days	2,000
Note issued July 18, 1916, for forty-five days	2,000
Note issued July 18, 1916, for sixty days	2,000
Note issued July 18, 1916, for seventy-five days	2,000
Note issued July 18, 1916, for ninety days	2,000
Note issued July 31, 1916, for four months	2,000

The total loans from March 27, to October 2, 1916, which were paid equal $22,000 in addition to the $6,000 given prior to March 27, 1916.

It was stated on behalf of the plaintiff that the loans obtained by the defendants amounted to $20,000, on which the following amounts were received:

20% of the $20,000, amounting to $3,976.71 from the composition proceedings;

$1.54, a credit balance due the Myers;

A note of a customer of the Myers firm due on January 30th, 1917, for $110, which the plaintiff collected;

26 A note for a bankruptcy dividend, 10%, payable December 1917; and a second note for a similar dividend, 10%, payable in January, 1917, each for $1,988.34, making a total credit of $8,067.97, which left a balance of $11,932.03.

On redirect examination, the witness testified in substance as follows:

The note for $110 was a note of ours sent for collection to the International Trust Company and they collected it. The two notes of $1,988.36 were given in the bankruptcy proceedings. If I had taken $26,000, which we received from the Commercial Investment Trust, from the accounts receivable, and had also taken that amount from the accounts payable, it would not have altered our net worth. The Commercial Investment Trust always deducted an interest reserve from the schedules of 2%, and we were usually ahead of the game and usually when balancing, we had interest refunds coming to us, so that if anything on that date if we had balanced our interest account with the Commercial Investment Trust, they would have owed us some money and would have increased our net worth.

The witness continued: When we assigned a mass of accounts, they were supposed to pay us 80% of the face of those accounts, but they did not. They paid us 2% less, that is, they paid us 78% and kept 2% back, which they held for expenses and interest accruing. The Commercial Investment Trust allowed us no interest on the reserve while they held it. If the accounts were paid, the checks came to us and we sent them to the Commercial Investment Trust. They remitted to us the 20%. In addition to the interest we were paying the Commercial Investment Trust, we were giving discounts to customers if they paid within stated periods.

Q. * * * As I understood your testimony, it made no difference in this statement whether you put that—whether you included that money that you got from the Commercial Investment Trust in it or not. You got the net worth, exactly the same thing.

A. The net worth as of the books absolutely.

* * * * * * *

Q. What would you have done with the interest that you had to pay for that money?

A. If I had eliminated—see if I understand that question right. If I eliminated from my accounts receivable the amount of the ac-

counts assigned to the Commercial Trust, and eliminated from the accounts payable the amount assigned, what would I have done—what would I have done with the interest which would have to be adjusted—is that your point?

Q. The interest which you were paying these people?

27 A. Well, this statement is made up from the books. The way I understand it is that you question, while perfectly right, either way there would have to be an interest adjustment if we reimbursed the Commercial Investment Trust for every account and stopped doing business with them, then we would have adjusted the interest account, but according to my books, if I just simply eliminated accounts on both sides, my books would have remained subject to adjustment of interest, to do anything with that interest charge we would have had to stop doing business with the Commercial Investment Trust.

When this statement, Exhibit 6, was made, we intended that whoever saw it should rely on it, and that they should take it just as it was made out. In the year 1916 the International Trust Company had discounted $22,000, and coming over from the previous year another $6,000.

In the statement of March 27, 1916, Exhibit 6, in the item accounts receivable of $58,425, I included the assigned accounts of $26,900, and in the accounts payable of $76,102, I included the same amount to offset the other entry, although we had received only 78% of the $26,900, so that 22% of the amount, $26,900, was not received, and of that 22%, 2% was reserved and the other 20% was to come back to us, when I included 20% among the accounts payable, I was including an item not owed by us. We sent the amounts collected to the Commercial Investment Trust.

Q. Was that done by virtue of the authority given in this agreement, this assignment with the Commercial Investment Trust * * * Exhibit 8, paragraph 4; "First party is hereby given the privilege at its own expense, to make for said second party collections of accounts assigned to second party, but said privilege may be terminated by second party at any time. First party shall transmit and deliver to second party at its office in New York, N. Y., on the day of receipt thereof every original check, draft, note and other medium of payment received in payment of or on account of any account assigned to second party."

A. Well, I was not following the contract. I was following the instructions of the auditor of the company, of the auditor of the Commercial Investment Trust.

We only paid 1/30 of 1%, on the daily balance. We did not pay anything in addition to 1/30 of 1% per day as we were doing over $100,000 worth of business. During the course of any one year the accounts which we assigned to the commercial Investment Trust amounted to more than $100,000. I do not remember what was the total amount of accounts receivable assigned in the year 1916 down to October 2nd, 1916, the date of this first note, but it was over $100,000. I carried the amount of accounts assigned

28 in accounts receivable, and also in accounts payable, one item offsetting the other; although we only received 78% of that sum which exceeded $100,000 in accordance with instructions of the Investment Trust. They governed the entries on our books, and I took my instructions from them as to those entries. No one gave me orders to take instructions from them. I permitted the Commercial Investment Trust to tell me what entries to make because their auditor requested the entries. Being the auditor, I took his word that he had the right, as representing the Commercial Investment Trust, to do so. I do not remember any blank statement coming with the letter of March 22nd, Exhibit 9, of the International Trust Company.

A blank form, said by the plaintiff to be in use at that time, March, 1916, was offered in evidence. The defendants stated they were content with the plaintiff's statement that the blank was in current use at that time. The admission of this form was objected to by the defendants on the ground that there was no evidence that defendants had received such a blank.

The Court: "Well, there is the assertion in the letter that there is annexed a blank; that is not contradicted by anybody as far as they know. They don't recall about it. They have not said positively that it was not so, so that the letter confirming or asserting that that is annexed to that is some evidence that it may be annexed, I suppose."

The court permitted the form to be read to the jury. The defendants duly excepted, and their exception was saved. The form of the statement was as follows:

"To the International Trust Company of Boston. Name blank of blank, address blank street; Business blank.

"For the purpose of procuring and establishing credit from time to time with the above Trust Company for claims and demands against the undersigned the undersigned furnished the following as being a true and accurate statement of his or their financial condition on the blank day of blank 19—.

"In consideration of the granting of such credit the undersigned agree that if the undersigned at any time fail or become insolvent or commit any act of bankruptcy or if any of the representations made below prove to be untrue or if the undersigned fail to notify you of any material change as before agreed then and in either such case all obligations of the undersigned held by you shall immediately become due and payable without demand or notice and the same may be charged against the balance of any deposit account of the undersigned with you, the undersigned hereby giving a con-
29 tinuing lien upon such balance of deposit account from time to time existing to secure all obligations of the undersigned held by you."

Then there are two columns one marked assets and the other liabilities. Under the asset column come the following:

"Cash on hand blank. Cash in Bank blank. Bills Receivable good and collectible not matured made by customers, blank. Ac-

counts outstanding, good and collectible not matured owing by customers, blank.

"Merchandise on hand at actual present cash value. Machinery and Fixtures. Real Estate in the name of firm at actual present cash value described as follows: Other assets and of what composed. (Each one of those different items has a line to itself.)

"Under the head liabilities. Bills Payable for borrowed money. Bills Payable for merchandise. Accounts payable. Money on deposit with us. Mortgages or liens upon real estate; description of other indebtedness and of what composed. Total liabilities. Net worth. (Both columns have blanks for totals. Then on a new line.) Contingent liabilities, accommodation endorsements do not exceed, blank. Bills Receivable endorsed by firm outstanding do not exceed, blank."

Then on another line:

"Amount of sales last year. Losses by bad debts. Amount of fire insurance. Annual expenses including partners drawing. Are all bad or doubtful assets excluded from above statement? Are any of above assets pledged or liabilities secured by collateral, judgment notes or otherwise? Names in full of all general partners. Amounts contributed by each and until what time. Individual worth of respective partners outside the business. Individual liability direct or indirect of respective partners. Interest of partners outside of the business. We have accounts in the following named Banks only. References. Names of firms extending us credit. Any change in condition since date of above inventory. Firm signature by, blank. Date signed 19—."

The plaintiff here rested.

The defendant offered proof consisting of the Printed Record in the bankruptcy proceedings on appeal including the petition for a meeting, order of reference, offer of composition, the Referee's Report on Composition, Application for Confirmation of Composition, Objection to Confirmation of Composition, of the International Trust Company, Specifications of grounds of Opposition to Confirmation of Composition, the petitions for leave to amend those specifications, the order referring the objections to the Referee, the Referee's Report thereon, the Referee's supplemental report thereon, Order Confirming Composition, the memorandum of Decision of the
30 District Judge, the petition for appeal, Assignments of Error, Bond on appeal, the evidence on which the proceedings were had, citation on appeal and the clerk's certificate of the Record all in the printed volume as it went to the Circuit Court of Appeals, the opinion of the Circuit Court of Appeals; and the mandate from the Circuit Court of Appeals affirming the order of the District Court confirming the composition in bankruptcy.

The court excluded the evidence and the defendant excepted, which exception was duly saved. The Printed Record was marked Exhibit A for identification and the opinion and mandate of the

Circuit Court of Appeals was marked Exhibit B for identification. These may be referred to as though they were attached to this bill of exceptions. The defendants contended that these established the defense of estoppel by judgment and that their effect was to be determined by the laws of the United States in whose court the proceedings had occurred.

The court ruled that so much of the mandate from the Circuit Court of Appeals as confirmed the order confirming the Composition in Bankruptcy was admissible in evidence. This was marked Exhibit 11. (See Exhibit 11 attached to this Bill of Exceptions.)

It was agreed that if the offer of proof was admissible, no objection was made to the form of presenting the documents or to the fact that the documents were not authenticated, and no objection was made as to the truth of the facts contained in the documents.

The foregoing was all the evidence introduced.

The defendants requested the following rulings and instructions to the jury:

1. On all the evidence, the plaintiff is not entitled to recover, for the several reasons hereinafter stated.

2. A discharge in bankruptcy bars a claim of the kind alleged in the declaration in this case unless it is a liability "for obtaining property by false pretenses or false representations." (Bkcy. Act. Sec. 17, Cl. 2.)

3. "False" as used in this exception is to be given the meaning with which it is used in this section (Sec. 17, Cl. 2) of the Bankruptcy Act of the United States, under the settled construction placed upon it by the United States Courts.

4. "False" as used in the exception stated in the second request means not only incorrect but also intentionally or knowingly so.

5. A statement of the character here in question in order to be "false" as that word is used in this exception (Bkcy. Act, Sec. 17, Cl. 2) must have been made with knowledge that it was false and with actual intent to obtain property or credit by means of a false statement.

31 6. The plaintiff cannot recover unless there was an intention on the part of the defendants to deceive.

7. As the statement is in writing, its construction is to be determined by the court.

8. The mere failure to state that the accounts had been assigned as collateral security to the Commercial Investment Trust would not make the statement false.

9. If at the time the money or credit in question was obtained from the plaintiff by the defendants, the money, advanced by the Commercial Investment Trust on January 1, 1916, for the repayment of which the accounts had been assigned as collateral, had all been repaid, there was no existing falsity in the statement at the time the plaintiff made the loans.

10. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendants' offer in composition establishes conclusively for the purposes of the present case that the statement was not false.

11. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendants' offer in composition establishes conclusively for the purposes of the present case that the statement was not made with an intention to deceive.

12. The discharge of the defendants by the confirmation of the composition is a bar to this action.

13. The burden of proof is on the plaintiff to show that it comes within the exception to the discharge.

The Court instructed the jury as follows:

That Act (Bankruptcy) provided in substance that when a person is insolvent and is placed in bankruptcy either by the creditors or goes in voluntarily himself, the assets of the bankrupt shall be taken possession of and reduced to money for the benefit of the creditors, or if the debtors, the bankrupts themselves, see fit to make an offer of compromise or composition, that is, offer so many cents on the dollar, such a percentage, and the majority of the creditors agree to it, and that is approved by the Court, I mean the Federal Court, the United States District Court, then they call that an offer of composition which has been accepted by the Court, and when that has been done it has the same effect and value as if the Court had formally granted a discharge of all the provable claims against the debtors or bankrupts. So, such discharge is a release, a bar to any claim that is provable in bankruptcy, and is not excepted from the provisions of the Bankruptcy Act. Now the bankruptcy law
32 says that there are certain debts that no discharge or procedure under the composition clause of the Bankruptcy Act,—there are certain claims that cannot be discharged, either by a discharge or by composition proceedings and among them is a claim that the plaintiff claims applies here, that is, where a statement has been made, material statement has been made to a person, and money or credit has been obtained by false pretenses or false representations, such a claim arising from that, is not discharged in bankruptcy proceedings whether under the composition clause or under the general discharge clause. Now the plaintiff claims that this case falls in that class of exception to the Bankruptcy Act where the Bankruptcy Act does not relieve a debtor or a bankrupt. The defendant on the other hand claims that it is not that sort of a claim, that it is not a claim that is founded upon false pretenses or false representations and that leads us to the question as to what sort of false pretenses and false representations is required to take the claim out of the provisions of the Bankruptcy Act.

I instruct you for the purposes of this case and rule that the false pretenses and false representations which are required to take the case out of the governing provisions of the Bankruptcy Act is one where the false representation is made wilfully and knowingly, in other words intentionally made, and where the representation is false and the party who makes it knows that it is false and intends that the person or corporation to whom he makes it shall act upon it and be misled by it.

* * * * * * *

First we have to consider the question as to whether any statement made up here was material, was important, was intended for the other side, for the Bank to act upon. Did it relate to the subject matter of the advancing of money? Was the Bank acting upon it? Was it something that was intended by the defendants that the Bank should act upon, the statement? Was it the idea of the defendants, when they furnished this statement, that they wanted credit, money advanced to them and that the Bank would act upon this, would take this to be true? Is that a correct statement, correct financial statement of their condition If you find such to be the fact you might find that this was materially important in the obtaining of money or credit from the Bank.

Now was any part of this statement untrue, was the part relating to the accounts receivable, that is the sums that were due them, a correct statement? Was the part as to the money which they owed a correct statement? It is claimed by the plaintiff that neither of these sums were correct, and that it has been admitted on the stand they were not correct. Well, it is a question of fact for you
33 to determine on this evidence as to whether any of these statements were untrue, were intentionally made to mislead and deceive the plaintiff in the case.

Now it is in evidence that in July, 1915 the defendants assigned, by an instrument which is in evidence, which may be called an assignment, the accounts receivable, the debts due, as collateral security for money to be advanced by the Commercial Investment Trust of New York, and it is in evidence that they, the defendants, were getting on this assignment seventy-eight per cent of the amounts represented by these accounts receivable.

* * * * * * *

Now it is claimed by the plaintiff that this statement was untrue, that these accounts receivable, they didn't have them, that they were sold to somebody else at that time, that being sold to somebody else they didn't own them, they were not accounts receivable by them, though they might, in form receive them, they were receiving them as agents for this concern in New York and not as owners, and it is claimed that they wanted the Bank to believe that they owned them, not only collected the money for them, but that the money belonged to them, that it was part of their assets, instead of that,—the Bank claims that instead of being part of their assets, it must be diminished at least by the sum of interest that they had to pay, from sixteen, approximately sixteen to eighteen per cent that they had to pay to this concern to advance that money, and there was an item of two per cent that was intended to cover some incidental charges. * * * Now the Bank says that this was not a true statement, the defendants knew about their business,—the first defendant who signed here, Mr. Samuel A. Myers, was the one who had charge of the financial end of the office, the other being a salesman and also a travelling man, although if one made a misrepresentation the other is bound by what his co-partner did, if he let

him have charge of the business he is bound by what he has done within the scope of the partnership business, and borrowing money for the use of the partnership would be acting within the scope of the partnership business,—now the Bank says they were deceived, if they had known the true facts, if they had known that out of fifty-eight thousand dollars that you say that you had of accounts receivable you had sold nearly one-half of them or transferred them to a Trust concern in New York on which you were getting seventy-eight per cent advance in money, you could not have got any credit at our Bank because it would have shown that your financial condition was entirely different from what you led us to believe by this statement that it was. In other words by making this statement to us, the Bank says, you misled us. If this statement was true
3' then there is no reason why you should go into bankruptcy but this statement being untrue, your getting advances from a concern, as has been described under that assignment, through giving as collateral, accounts receivable, greatly reduced the financial strength and ability of the defendants and the Bank wasn't aware of that because it acted upon this written statement believing it to be true, was led to believe that it was true, whereas in fact it was not true and the defendant knew it. Well, it is for you to say whether the defendants through Mr. Samuel A. Myers made a statement knowing it to be erroneous, wrong.

Now the kind of misrepresentation that the law requires to take the case out of the Bankruptcy Act, either under the composition clause, or the discharge clause, must be an intention misrepresentation, that is, it must be a representation that the party knows is an erroneous one, false one, an untrue one.

* * * * * * *

Now in order to recover the plaintiff has the burden of proof of satisfying you by a fair preponderance of the evidence that these notes were given to the plaintiff by the defendants upon false representations by the defendants as to their financial condition as contained in Exhibit 6. That the defendants knew that this statement was untrue and misleading, that it was given to the plaintiff with the idea that the plaintiff should rely upon it, that the plaintiff did actually rely upon it, believed it to be true and that it was false and the defendants knew it was false. If the plaintiff succeeds in making out the propositions that I have just stated they succeed in making out a cause of action, and they would be entitled to a verdict for the balance due them. I will give you this paper which I hold in my hand so that you may get the amount. If the plaintiff is entitled to recover, the plaintiff would be entitled to recover the sum of $11,932.02 plus interest at the rate of six per cent per annum from the date of the writ, November 6, 1917. That is, the plaintiff would be entitled to recover the balance due on the notes and what they lost, namely the principle plus the interest at the rate of six per cent in order to make them whole, the principle of damages being that a person should be made whole; unless on the other

hand you believe that there was either no untrue statement made by the defendants or that the defendants did not know or intend, if the statement be untrue that it was untrue, or intend it to be untrue, intend to mislead the plaintiff. In other words, the law under that branch of the case requires that there should be actual fraud, intentional desire to mislead and a person misled by the statement made, they call that actual fraud as distinguished from constructive or presumed fraud, or fraud implied simply from circumstances.

* * * * * * *

So you see you have got to determine the question first was there an untrue statement made by the defendants, if there was, was it made by the defendants with knowledge that it was untrue, was it material, was it important, something that was intended for somebody to act upon, to advance money upon; if it was material, was it made with a view that the person or corporation or company to whom it was made should act upon it, and did that person act upon it, and was that person misled upon that untrue statement. Now if all those elements appear the plaintiff makes out a case. If on the other hand any of them fail, if the statement made was not material, if the statement made was true, of course that is the end of the plaintiff's case.

* * * * * * *

Now I have the requests of the defendants to deal with. Number 2. A discharge in bankruptcy bars a claim of the kind alleged in the declaration in this case unless it is a liability for obtaining property by false pretenses or false representations.

This mention of discharge in bankruptcy, this proceeding that has been read to you by the defendants' counsel is a document that is equivalent to a discharge in bankruptcy except in cases where money has been obtained by false pretenses and false representations.

Number 3. False as used in this exception is to be given the meaning with which it is used in this section, Section 17, clause 2, of the Bankruptcy Act of the United States, under the settled construction placed upon it by the United States Courts. I give you that.

Number 4. False as used in the exception stated in the second request means not only incorrect but also intentionally or knowingly so.

I think I have said that before. I give you that.

Number 5. A statement of the character here in question in order to be false as that word is used in this exception of the Bankruptcy Act, Section 17, Clause 2, must have been made with knowledge that it was false and with actual intent to obtain property or credit by means of a false statement.

Well, number six I think I have given in substance before.

Number 7. I am disturbed about that. As the statement is in writing, its construction is to be determined by the Court.

Of course there are only figures here practically and a statement of what the figures stand for, I don't know as there is much
36 that is left to construction. If the counsel think I ought to explain something further,—I agree with the general proposition of law, that a writing is for the Court to construe whether I am called upon to give any further construction than I have done why the counsel will call my attention to it.

Mr. McClennen: It was merely introductory for the next one.

The Court: Number 8. The mere failure to state that the accounts had been assigned as collateral security to the Commercial Investment Trust would not make the statement false.

I can't say that. No, that request I refuse. That is, it is for the jury to say as to the failure to mention that transaction with the Commercial Investment Trust Company whether it meant to do so or was intending to convey a misleading impression to the plaintiff.

Number 9. If at the time the money or credit in question was obtained from the plaintiff by the defendants, the money advanced by the Commercial Investment Trust on January 1, 1916, for the repayment of which the accounts had been assigned as collateral, had all been repaid, there was no existing falsity in the statement at the time the plaintiff made the loans.

I don't quite understand that request. It is in evidence that there were some accounts that were being paid from time to time, how many of them exactly were paid, I don't recall that the evidence fixes it definitely, except that the bookkeeper I think testified that in January there was $26,900 that had been transferred, and on March 27, the date of the statement, there had been some forty odd thousand that had been transferred. Now exactly how many had been paid I don't recall any evidence about that, that some had been paid has been testified to by the bookkeeper, that they received from time to time from their customers various amounts, and it is true that if all those accounts had been paid it is a possible view of the evidence, it is for the jury to say whether it is a possible view of the evidence that those accounts had all been paid when they obtained the money.

Number 13. I think I have already stated in substance.

* * * * * * *

Mr. McClennen: In the principal part of the Charge I should like to except to the direction that interest is to be added from the date of the writ.

The Court: Yes.

Mr. McClennen: * * * And to the refusal of the defendants' first, eighth, tenth, eleventh and twelfth requests.

The Court: Yes.

* * * * * * *

37 The jury returned a verdict for the plaintiff and assessed damages in the amount of $14,304.49.

The defendants pray that their several exceptions hereinbefore set forth be allowed. By their attorneys, Dunbar, Nutter & McClennen. August 30th, 1921.

Exceptions allowed. Hugo A. Dubuque, Justice Superior Court. Filed Aug. 30, 1921.

DECLARATION.

And the plaintiff says that it is a corporation organized under the laws of the Commonwealth of Massachusetts having a usual place of business in Boston in the County of Suffolk in said Commonwealth; that for a number of years it has carried on a banking business in said city and that as a part of said banking business it loans to corporations and business concerns money to enable such corporations and business concerns to carry on their business.

That Samuel A. Myers is a resident of Boston, and Harry Myers is a resident of Brookline in the County of Norfolk, and carry on as partners under the firm name of S. A. and H. Myers the business of manufacturing boys' and youths' clothing which firm has its place of business in said Boston; that said business has been carried on by the defendants for a number of years and puts out its articles of clothing under the trade name of "Widow Jones;" that the said firm of S. A. and H. Myers were successors to a previous partnership, succeeding to all the rights and liabilities of said previous partnership which had been in existence many years and had conducted a successful and prosperous business and had acquired a reputation for reliability and financial responsibility.

That for a number of years the said partnership of S. A. and H. Myers and the business to which the said S. A. and H. Myers had succeeded had done their banking business with the plaintiff keeping a deposit account with said plaintiff and a loan account and had obtained the confidence and trust of the plaintiff.

That for a number of years it had been the practice of the defendants and of the partnership to which they had succeeded, to submit at the beginning of each year to the plaintiff a statement setting out the financial condition of said business, said state-
38 ment showing the assets and liabilities of said firm for the purpose of disclosing to the plaintiff their financial condition and to enable the plaintiff to determine whether or not it would advance money to said partnership when requested during the ensuing year and with the intention on the part of said firm that the plaintiff should rely thereon as being a true and accurate statement of said financial condition; that the plaintiff relying on said statements and believing them to be true, from time to time advanced money to the defendants thereon during the ensuing year.

That on the 24th day of February, 1915, the defendants gave to the plaintiff such a statement showing the financial condition of the defendants as of January 1, 1915, and thereupon upon the credit of said statement obtained loans from the plaintiff; that on the 27th

day of March, 1916, the defendants gave to the plaintiff a statement of the condition of the defendants on January 1, 1916, said statement showing that the defendants had assets amounting to the value of $219,326.17 of which it had accounts receivable amounting to $58,425.06; and further that the liabilities were $83,510.33 less than said assets.

That the plaintiff relying upon said statement and upon the fact as set forth that the excess of assets over liabilities was $83,410.53 and that the defendants had accounts receivable amounting to $58,425.06 and believing said statement to be true, accurate, full and complete and further believing that the defendants had disclosed in said statement all facts upon which the plaintiff could determine what was the true financial condition of said firm and further believing that the said firm was conducted in the same honest and reliable way and having no knowledge or information that said statement was not complete in any particular and was not true and accurate loaned to the defendants the sum of $20,000 as requested by the defendants on the following days and in the following sums, to wit:

October 2, 1916	$2,000
November 2, 1916	2,000
November 10, 1916	2,000
November 13, 1916	2,000
December 1, 1916	2,000
December 8, 1916	2,000
December 11, 1916	2,000
December 13, 1916	2,000
December 15, 1916	2,000
December 18, 1916	2,000

That the defendants previous to the summer of 1915, began to suffer reverses and had drawn heavily on the capital invested in said business and had materially reduced the same and to have difficulties in carrying on their business and required large sums of
39 money to make good such withdrawals; that on the twenty-third day of July, 1915, the defendants entered into an agreement with the Commercial Investment Trust, a Trust created under a declaration of trust executed in Boston and having its principal place of business in New York, whereby the defendants agreed to bargain, sell, assign and deliver accounts receivable to the said Commercial Investment Trust at a discount at rates of interest amounting to about 16 per cent per annum; that from time to time the defendants did bargain, sell, assign and deliver to said Commercial Investment Trust various accounts receivable; that on January 1, 1916, the defendants had bargained, sold, assigned and delivered to said Commercial Investment Trust accounts amounting to the sum of $26,997.63; that on March 27, 1916, the date when said statement was delivered to the plaintiff the defendants had bargained, sold, assigned and delivered to said Commercial Investment Trust accounts receivable amounting to $36,441.13; that by virtue of said

assignment the defendants no longer owned or controlled such accounts receivable as had been assigned.

That the defendants with the intent that the plaintiff should believe that the defendants were in strong financial condition and that their methods of doing business had not been changed and that said statement was true and intending that the plaintiff should advance money to the defendants in reliance upon the continuation of the same methods of doing business, and upon the strength of said statement concealed from the plaintiff the fact that they had made an agreement and the fact they had assigned accounts receivable to a considerable amount and the plaintiff relying upon the truth of said statement and believing that the same continued to set out the true financial condition of the defendants and without knowledge or information of said agreement and of the fact that accounts receivable had been assigned, made the advances as aforesaid, whereas the truth of the matter as the defendants well knew was that the defendants had changed their method of doing business by making said agreement and on January 1, 1916, did not own $58,425.06 of accounts receivable as set out in said statement in that they had bargained, sold and assigned accounts to the value of $26,997.63 and had on the 27th day of March, 1916, bargained, sold and assigned the accounts amounting to $46,441.13 as the defendants well knew.

That on or about the last day of January, 1917, an involuntary petition in bankruptcy was filed against the defendants in the United States District Court for the District of Massachusetts; that thereafter in said bankruptcy proceedings the plaintiff received the sum of $3,976.71 in cash on account of said loans.

Wherefore the defendants owe the plaintiff the sum of $16,023.29 with interest thereon. By its attorney, John R. Lazenby.

Filed Dec. 3, 1917.

40 **DEFENDANTS' AMENDED ANSWER.**

Now come the defendants in the above entitled cause and for answer deny each and every allegation in the plaintiff's writ and declaration contained.

And the defendants further answering say that by virtue of proceedings instituted in the United States District Court for the District of Massachusetts on the twenty-seventh day of January, 1917, case No. 24571, under the provisions of "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" and other acts relating to bankruptcy, the plaintiff filed a claim against said alleged bankrupts, which claim was proved and allowed, and, thereupon, an offer in composition was filed by said defendants as alleged bankrupts, which offer in composition was confirmed on May 28, 1917, whereby the defendants were discharged from all debts and claims, inc' ling the plaintiff's claim against your defendants, which were prov against the estate in bankruptcy.

And fu. r answering your defendants say that in proceedings originally instituted in the United States District Court for the District of Massachusetts on the twenty-seventh day of January, 1917,

under the provisions of "An Act to Establish a Uniform System of Bankruptcy Throughout the United States" and other acts relating to bankruptcy, in case No. 24571 of the United States District Court for the District of Massachusetts, in bankruptcy, the plaintiff in this action participated in said bankruptcy proceedings, and filed his objections to the confirmation of the composition, a copy of which objections is hereto annexed and made a part of this answer, and raised the same issues as now sued on by the plaintiff in this action, which issues were heard between the parties and determined in favor of the present defendants; that all matters and things contained in this suit were adjudicated upon in said suit in said United States District Court, and appealed by the plaintiff to the Circuit Court of Appeals for the First Circuit of the United States, and all matters and things contained in this suit were adjudicated upon and finally determined in favor of the defendants.

Wherefore your defendants pray that this action may be dismissed. By their attorneys, Julius Nelson. Samuel O. Reinstein.

Filed by consent March 27, 1919. Copy. Attest: —— ——, Clerk.

41 UNITED STATES OF AMERICA:

District Court District of Massachusetts. In Bankruptcy.

In the Matter of S. A. & H. MYERS, Alleged Bankrupts.

SPECIFICATIONS OF GROUNDS OF OPPOSITION TO ALLEGED BANKRUPT'S PETITION FOR CONFIRMATION OF COMPOSITION.

The International Trust Company, of Boston, in the County of Suffolk, and Commonwealth of Massachusetts, a party interested in the estate of said S. A. and H. Myers, alleged bankrupts, does hereby oppose the allowance of their petition for confirmation of the composition and for grounds of such opposition file the following specifications:

On or about the 10th day of May, 1916, the above named alleged bankrupts obtained on credit the sum of $2,000. On or about the 2nd day of October, 1916, the above named alleged bankrupts obtained the sum of $2,000. On or about the 8th day of December, 1916, the above named alleged bankrupts obtained the sum of $2,000. On or about the 11th day of December, 1916, the above the 13th day of December, 1916, the above named alleged bankrupts obtained the sum of $2,000. On or about the 15th day of December, 1916, the above named alleged bankrupts obtained the sum of $2,000. On or about the 18th day of December, 1916, the above named alleged bankrupts obtained the sum of $2,000 and they obtained said sums by the statement made in writing to the International Trust Company that on the first day of January 1916, the accounts receivable amounted to $58,425.06; that the alleged bankrupts in said statement set out that they owed notes payable amounting

$59,715.12; that the alleged bankrupts did not include in the said item of notes payable a note of $3,000 secured by a mortgage of certain real estate and said statement was materially false and was made for the purpose of obtaining the aforesaid sums on credit. International Trust Co., by Chester B. Pierce, Asst. Treasurer.

8th March, 1917.

Then personally appeared Chester B. Pierce, Assistant Treasurer of the International Trust Company, being first duly sworn upon his oath says that the facts set forth in the foregoing specifications are true to the best of his knowledge and belief. (Seal.) Howard Norton, Notary Public.

42 Endorsed: No. 24571. In the Matter of S. A. & H. Myers Alleged Bankrupts United States District Court Mass. Dist. Filed in Clerk's Office Mar. 9, 1917, 12 M.

Specifications of Grounds of Opposition to Alleged Bankrupts' Petition for Confirmation of Composition.

John A. Lazenby, 57 Equitable Bldg., Boston.

A true copy: Attest: James S. Allen, Clerk. (Seal.)

"EXHIBIT 1.

Jan. 14, 1910.

Resources.

Accounts Receivable	45,508.75
Cash on hand and in bank	17,501.36
Mdse. " " " " process of manufacturer	77,910.95
Machinery and Fixtures	3,487.24
	$144,408.30

Liabilities.

Accounts Payable	29,549.71
Notes "	62,348.50
Balance Net Capital	52,510.09
	$144,408.30

S. A. & H. MYERS."

"EXHIBIT 2.

November 1st, 1911.

Resources.

Accounts Receivable	97,428.96
Cash on hand and in bank	9,253.17
Mdse on hand and in process of manufacturing	78,696.00
Machinery & Fixtures	3,659.99
	$189,038.12

43 Liabilities.

Accounts Payable	59,046.63
Notes "	51,698.06
Balance Net Capital	78,293.43
	$189,038.12

S. A. & H. MYERS.
S. A. MYERS."

"EXHIBIT 3.

December 2, 1912.

Resources.

Accounts Receivable	77,264.16
Cash on hand and in bank	17,573.74
Stock on hand, manufacturer and in process of manufacture for next season	105,803.35
Machinery and Fixtures	5,709.50
	$206,350.75

Liabilities.

Accounts Payable	63,152.00
Notes "	57,730.05
Balance Net Capital	85,468.70
	$206,350.75

S. A. & H. MYERS.
S. A. MYERS."

"EXHIBIT 4.

December 1, 1913.

Resources.

Accounts Receivable	73,272.74
Cash on hand and in bank	9,583.77
Mdse. on hand and in process of manufacturer	113,527.39
Machinery and Fixtures	3,738.32
	$200,122.22

Liabilities.

Accounts Payable	55,042.53
Notes "	58,181.04
Net Capital	86,898.65
	$200,122.22

S. A. & H. MYERS.
S. A. MYERS."

44 **"EXHIBIT 5.**

February 24, 1915.

International Trust Co., Boston, Mass.

GENTLEMEN: The following is a copy of our financial statement as of January 1st, 1915:

Mdse. in Stock & in process of manufacture	145,491.66
Cash on hand and in banks	3,459.23
Accounts Receivable	49,044.86
Machinery & Fixtures	8,571.71
	$206,567.46
Accounts Payable	57,572.60
Notes Payable	59,314.99
Net Capital	89,679.87
	$206,567.46

S. A. & H. MYERS.
By S. A. MYERS."

"EXHIBIT 6.

S. A. & H. Myers, Managers, 36 Otis Street, 3 Winthrop Square, Boston, Mass.

Raincoats Shops at Stoughton, Mass.

America's Leading Designer of Young Men's and Boys' Clothing.

Mar. 27, 1916.

International Trust Co. Boston Mass.

GENTLEMEN: The following is a copy of our Financial Statement, taken from Inventory January 1st 1916:

Mdse. in Stock & In process of manufacture	147,289.53
Cash on hand & in Bank	4,777.62
Accounts Receivable	58,425.06
Mchy. & Fixtures	8,833.96
	219,326.17
Accounts payable	76,102.72
Notes Payable	59,713.12
Net Capital	83,510.33
	219,326.17

Yours very truly,

S. A. & H. MYERS.
S. A. MYERS."

45 **EXHIBIT 7.**

(Copies of Ten Notes and Ten Protests.)

The notes and protests were on printed blanks, the same form of blanks being used for all. Copies of the note of October 2, 1916, and the form of the protest of this note follow, together with a table showing the respects in which the subsequent notes differ from that dated October 2, 1916. Each note was for two thousand (2,000) dollars.

Notes.

No.	Date.	Due.	Endorsements.
14820.	Oct. 2, 1916.	Feb. 2, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
5204.	Nov. 2, 1916.	Mar. 2, 1917.	S. A. & H. Myers. S. A. Myers.
6642.	Nov. 10, 1916.	Mar. 10, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
7133.	Nov. 13, 1916.	Mar. 13, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
9927.	Dec. 1, 1916.	Apr. 1, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
10843.	Dec. 8, 1916.	Apr. 8, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
11144.	Dec. 11, 1916.	Apr. 11, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
11510.	Dec. 13, 1916.	Apr. 13, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
11714.	Dec. 15, 1916.	Apr. 15, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.
12012.	Dec. 18, 1916.	Apr. 18, 1917.	S. A. & H. Myers. S. A. Myers. Harry Myers.

Protests.

No. of the note protested.	Date of protest.	Fee for postage, etc.
14820.	Feb. 2, 1917.	$2.06
5204.	Mar. 2, 1917.	$2.04
46		
6642.	Mar. 12, 1917.	$2.06
7133.	Mar. 13, 1917.	$2.06
9927.	Apr. 2, 1917.	$2.06
10843.	Apr. 9, 1917.	$2.06
11144.	Apr. 11, 1917.	$2.06
11510.	Apr. 13, 1917.	$2.06
11714.	Apr. 16, 1917.	$2.06
12012.	Apr. 18, 1917.	$2.06

[*Note.*]

Copy.

00

$2,000.100. Boston, Oct. 2, 1916.

Four months after date we promise to pay to the order of Ourselves two thousand 00/100 Dollars, payable at International Trust Co. Value received.

14820.

No. —. Due Feb. 2/17. S. A. & H. Myers.

Endorsements. S. A. & H. Myers. S. A. Myers. Harry Myers.

(*Copy of Protest.*)

Chester B. Pierce, Notary Public.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, City of Boston:

On the 2nd day of February in the year of our Lord, one thousand nine hundred Seventeen I, Chester B. Pierce, Notary Public, duly appointed and qualified for the Commonwealth of Massachusetts, practicing in the City of Boston, at the request of the Treasurer of the International Trust Co. of Boston, went with the original Note, which is hereto annexed, the time therein limited, having fully elapsed, and demanded payment thereof of the International Trust Co., Boston, Mass. and payment was refused, the answer being no order to pay.

The Note remaining unpaid, I duly and officially notified the endorser- of said dishonor by written notice addressed to them,
47 and mailed the same, postage prepaid, under cover to them in said notice requiring payment. Wherefore, I, the said Notary, by request as aforesaid, have protested and by these presents do solemnly protest against the maker of said Note, the endorser

thereof, and all others concerned therein, for Exchange, Re-exchange and all Costs, Charges, Damages, and Interest Suffered and Sustained, or to be Suffered and Sustained, by reason or in consequence of the non-payment thereof.

In testimony whereof I have hereunto set my hand and affixed my Notarial Seal, the day and year first above written. Chester B. Pierce, Notary Public, 45 Milk Street, Boston. [Notarial Seal.]

Fees:

Revenue Tax	....
Protesting for non-payment	$2.
Postage, Travel and Expense	.06
	$2.06

EXHIBIT 8.

(Copy of Contract.)

"Contract between Samuel A. Myers and Harry Myers, doing business under the firm name and style of S. A. & H. Myers doing business in the City of Boston State of Mass. party of the first part, and Commercial Investment Trust, being the designation of the Trustees under a Declaration of Trust made and delivered March 29, 1915, at Boston, Mass., and deposited with the Old Colony Trust Company of Boston, second party.

First. The second party agrees to make advances to first party upon the assignment to it, as collateral security therefor, of contracts, notes, accounts receivable and choses in action, arising from the sale of personal property dealt in by first party, hereinafter designated as accounts, which are acceptable to and approved by second party, First party shall pay second party interest at the rate of six per cent (6%) per annum upon every sum so advanced, and in addition thereto, a reasonable compensation for the labor, services and various matters and things obligatory upon said second party under this contract, which compensation shall, at the instance of either party hereto, be submitted for determination to a court of competent jurisdiction holding its sessions at the City and in the State where this contract is accepted, but second party agrees to accept as and for such compensation and interest upon any account assigned one per cent of the face amount of the account for the first 15 days or portion thereof, one per cent of the face amount of the account for the second 15 days or portion thereof, and one thirtieth of one per cent of the face amount of the account for each day thereafter during the time such account is held as collateral, provided that first party agrees to the same as reasonable on any accounting between the parties for the proceeds of
48 the account prior to recourse to any court. "Face amount" of any account as used in this contract shall mean the net amount thereof after the deduction of amounts deemed sufficient

to cover discounts, freight and other allowances and credits to debtors and any other deductions which may be agreed upon at the time advances are made. And advances shall be made as follows:

Upon the making of any such assignment second party shall advance to first party 80% of the net face amount of each acount assigned, less an amount to be estimated at the time of such assignment (but not to be then finally determined) for the reasonable compensation and interest hereinbefore provided for. And upon receiving payment of each account second party shall out of the proceeds reimburse itself for the amount advanced upon the account and for the amount which may be due it for compensation and interest and for any outlays for or with respect to the account (provided that if no amount shall have been so fixed by agreement, then said estimated amount thereof shall be temporarily deducted therefor), and shall pay first party the remainder of said proceeds, provided, however, that second party shall have a lien upon any such remainder for all amounts whatsoever due to it from first party while said remainder remains unpaid, and may deduct such amounts from any such remainder. The second party shall not demand repayment of any advance prior to the maturity of the account or accounts upon which the advance is made; provided, however, that if first party shall violate any of the provisions hereof or become insolvent within the meaning hereof, or discontinue the active operation of its business as a going concern, then second party may at its election demand immediate payment of the advances made by it and of all amounts owing to it under this contract.

Second. The second party shall (*a*) at its own expense, at least, every sixty days, send one of its auditors to the place of business of first party who shall examine the books and records of first party relating to the accounts assigned to the second party and deliver a copy of his report or summary to the first party upon written request; (*b*) instruct first party concerning the method of keeping their books, records and accounts; (*c*) supply first party forms required by first party for the execution of assignments of accounts to second party; (*d*) give the right to first party to submit any of its contracts of sale to the General Counsel of second party for advice and opinion as — the legality thereof; (*e*) do any and all things required of it by any bond given to it, by or for first party under or for any of the purposes of this contract and accepted by second party, it being agreed that any such bond shall be considered a part of this contract; (*f*) through its collection department endeavor to collect accounts of first party which first party
49 may deliver to second party for collection (*g*) through its credit department give information and opinions regarding credits which first party may submit to such department for advice; (*h*) pay all compensation, if any, to which H. Ittleson and C. L. Hemphill, or either of them or their substitutes, may be entitled for anything done under paragraph eight hereof and shall be responsible for their acts under said paragraph.

Third. All accounts assigned by first party to second party shall be duly transferred to second party in form and manner satisfactory to it. Such transfers shall be made at New York, N. Y., or Boston, Mass., and be governed by the law of the State where made. And said first party hereby warrants to said second party with respect to every account which it may assign to second party (1) that the account is a valid account for its face amount and that it arose from the sale by first party in the ordinary course of business of personal property dealt in by first party; (2) that the account is not subject to any set-off, counter-claim, contra-account or reclamation whatsoever, or to any discount or deduction not mentioned in the assignment thereof, or the documents accompanying the same, and that the payment thereof is not contingent upon the fulfillment of any contract or upon any condition whatsoever; (3) that the assignment of the account to second party correctly states or shows the date of the maturity of the account; (4) that all the merchandise, from the sale of which the account arose, has been or will be accepted by the debtor without objection thereto; (5) that the debtor is solvent and will remain so until his account is paid and that he will pay the same in full at or before its maturity; (6) that they will not assign any accounts to any person other than second party while this contract remains in force without first giving one day's written notice to second party; (7) that in the event second party incurs any expense, whether for attorney's fees or otherwise, in or for the collection of any account assigned to it, or in or for the enforcement or defense of any of its rights under this contract, or of any guaranty thereof or otherwise growing out of or connected with the subject matter af this contract and accounts assigned thereunder, then said first party shall pay to second party the amount of every such expense. Upon breach of any of the foregoing warranties with respect to any account, the first party shall, upon demand, pay to second party the amount advanced upon such account, together with all amounts to which second party may be entitled with respect to such account, or shall substitute for said account other collateral acceptable to second party. Upon such payment or substitution the account so in default shall be surrendered to first party. But while second party holds any account, it shall have the right in its discretion, to make any composition or compromise of, or to adjust any claim concerning the account and to extend the time of its payment.

Any one by or against whom a petition in bankruptcy is filed, or who makes an assignment for the benefit of creditors, or for whom or for whose business a receiver is appointed, or who asks for an extension from his creditors, or who openly acknowledges his inability to pay his debts in full, or who has a suspension of business, or who does any act amounting to a business failure, shall be deemed insolvent for all the purposes of this contract.

Fourth. First party is hereby given the privilege at its own expense to make for said second party collections of acounts assigned

to second party, but said privilege may be terminated by second party at any time. First party shall transmit and deliver to second party at its office in New York, N. Y., on the day of receipt thereof, every original check, draft, note and other medium of payment received in payment of or on account of any account assigned to second party.

With respect to every account assigned said second party shall have all rights of stoppage in transit. And if such right of stoppage in transit shall be exercised or if any debtor owing any account assigned shall refuse or fail to accept or retain or shall return any of the merchandise out of the sale of which the account arose, or should any such merchandise be re-routed or re-consigned, then said second party shall be entitled to all merchandise so stopped in transit, and also to all merchandise so refused, or not accepted or retained, or returned, re-routed or re-consigned, to be by it held as collateral security, with the right to sell or otherwise dispose thereof and the title to any new account created through the resale thereof shall also be and remain in said second party as collateral security.

Should any such merchandise come into the possession of first party, said first party shall at once notify second party thereof, and shall keep the same separate from all other merchandise for second party. Said second party may sell any such merchandise, either at public or private sale, with or without notice to first party, and apply the net proceeds thereof, after first paying all proper expenses towards the satisfaction of its claims against first party.

Fifth. First party agrees to execute and deliver to second party on demand, any instrument necessary or proper to carry into effect the terms, provisions and conditions of this agreement.

Immediately upon the consummation of the assignment to second party of accounts, first party agrees to make upon its books, suitable and proper entries disclosing the advance by and the assignment of said accounts to second party. Second party is hereby irrevocably given the right to inspect and audit the books, accounts, records, correspondence and papers of first party in relation to the accounts assigned it and advances thereon, at any time it may see
51 fit to do so. Presentation and demand for payment, protest and notice of protest and of non-payment of any and all notes or other evidences of indebtedness assigned to second party, and notice of the breach of any guaranty or warranty hereby made by first party, are hereby expressly waived by first party.

Sixth. Assignments of accounts and other papers transmitted, by first party by mail or express to second party at said City of New York, N. Y., shall be deemed to have been delivered to second party at said City; and payments and papers by second party transmitted to first party by mail, express or telegram, from said City shall be deemed to have been made or delivered at said City by second party.

Seventh. First party agrees to procure the execution and delivery to second party of a fidelity bond to secure to second party the assignment of valid accounts and the transmission to second party of every original check, draft, note and other medium of payment received

by first party in payment of or upon accounts assigned to second party.

Eighth. First party hereby irrevocably empowers and appoints H. Ittleson and C. L. Hemphill, and each of them, and any other person whom either or both may designate, to sign and endorse the name of first party upon every note, check, draft, money order, and every other medium of payment that may come into the possession of second party in payment of or upon accounts assigned to it by first party and upon any freight or express bill or bill of lading relating to any such account, verification statement, assignment of account and notice thereof to the debtor.

Ninth. This agreement and all its provisions shall inure to and bind the heirs, representatives, successors and assigns of the parties hereto, but shall not be binding upon the parties hereto until the same is accepted and executed by the second party, or one or more of the officers or agents of the Trust Estate, at its office in New York, N. Y., or Boston, Mass., and shall be construed as a Massachusetts contract.

Tenth. This contract is accepted by or on behalf of the Trustees under the Declaration of Trust aforesaid, not individually but as such Trustees to bind the Trust Estate.

In Witness Whereof, the party of the first part hereto has executed these presents at Boston, Mass. this 22nd day of July, 1915. S. A. & H. Myers. (Seal.) S. A. Myers. (Seal.)

Attest: —— ——, Secretary.

and the second party has executed these presents at the City of New York, N. Y., this 23d day of July 1915. Commercial Investment Trust, by Henry Ittleson President.

Attest: C. L. Hemphill, Secretary.

52 (The following Guaranty and Waiver is to be signed by individuals:

For and in consideration of the execution by Commercial Investment Trust of the foregoing contract at our request hereby made, the undersigned jointly and severally hereby guarantee to Commercial Investment Trust, its successors in trust and assigns, the full, prompt and faithful payment, performance and discharge by hereinbefore termed "First Party," of each of the agreements, guaranties, warranties, provisions and conditions set forth in the foregoing contract or in any rider now or hereafter thereto attached or in any other written instrument executed by said first party to carry out the provisions of said contract.

The undersigned hereby waive notive of acceptance of this guaranty by Commercial Investment Trust, also notice of any breach of any of said agreements, guaranties, warranties and conditions and of any default on the part of said first party or on the part of any debtor owing any account coming within the provisions of said contract.

In Witness Whereof, we, and each of us, have hereunto set our hand and seal this — day of —— 191-, at —.

Witness: —— ——.

By this rider attached to contract dated the 22d day of July A. D. 1915, between S. A. & H. Myers and Commercial Investment Trust,

and made part of said contract, it is agreed that the printed matter beginning with the sixth word "one" in line fifteen and ending with the ninth word "collateral" in line eighteen, be stricken out and in lieu thereof the following inserted, to wit:

"one-half per cent of the face amount of the first $100,000.00 of accounts assigned during twelve months succeeding the date hereof and during each twelve months' period beginning with each anniversary of the date hereof, and also one-thirtieth of one per cent of the face amount of all accounts for each day such accounts are held as collateral."

And that the following shall be inserted in said contract in line thirty-nine thereof immediately after the fifth word "shall."

"(*a*-1) Pay all charges for exchange on checks received in payment of assigned contracts."

The other terms and conditions of said contract to which this rider is attached, shall remain in full force and effect. S. A. & H. Myers, by S. A. Myers. Commercial Investment Trust, by Henry Ittleson, President.

53 **EXHIBIT 9.**

March 22, 1916.

S. A. & H. Myers, Esqs., 36 Otis St., Boston, Mass.

GENTLEMEN: In order that our credit files may be complete, and as we have received no statement from you since January 1, 1915, we would thank you to send us on the enclosed form statement of your financial condition, which statement is for our exclusive use and will be treated as strictly confidential.

Awaiting your pleasure, we remain, Very respectfully, (Sgd.) H. L. Jewett, Vice President."

CEM/ANS.

Enc.

EXHIBIT 11.

Material Parts of the mandate, affirming the order of the District Court confirming the composition, were as follows:

"Whereas, lately in the District Court of the United States for the District of Massachusetts, before you, in a cause numbered and entitled, No. 24,571, In Bankruptcy, in the matter of Samuel A. Myers et al., Alleged Bankrupts, the following Order was entered May 28, 1917:

Order Confirming Composition.

May 28, 1917.

An application for the confirmation of the composition offered by the bankrupts having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having

been deposited as ordered in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interest of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the Acts of Congress
54 relating to bankruptcy; it is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness, the Honorable James M. Morton, Jr., Judge of said court, and the seal thereof, this twenty-eighth day of May, A. D. 1917. Mary E. Prendergast, Deputy Clerk.

And whereas the International Trust Company appealed from said order to this United States Circuit Court of Appeals for the First Circuit,

On consideration whereof, It is now, to wit, August 25, 1917, here ordered, adjudged and decreed as follows: The order of the District Court confirming the composition is affirmed, and the appellees recover their costs of appeal.

Costs in this United States Circuit Court of Appeals for the First Circuit, for which execution is to issue from said District Court in favor of said Samuel A. Myer et al., Bankrupts Appellees, and against said International Trust Company, Creditor, Appellant, are taxed at twenty dollars ($20.00).

55 [Endorsement omitted.]

RESCRIPT.

[Filed June 15, 1922.]

[Title omitted.]

Ordered, that the clerk of said Court in said county make the following entry under said case in the docket of said court, viz.: Exceptions overruled. By the Court. Walter F. Frederick, Clerk. June 15, 1922.

BRIEF STATEMENT OF THE GROUNDS AND REASONS OF THE DECISION.

See opinion on file.

Thence the case was continued unto the twenty-second day of July, 1922.

And now on said twenty-second day of July, A. D. 1922, this action is still pending.

56 All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Superior Court to be hereunto affixed.

Witness, Walter Perley Hall, Esquire, Chief Justice of our said Superior Court, at Boston, in said County of Suffolk, this twenty-second day of July, in the year of our Lord one thousand nine hundred and twenty-two. [Seal of The Superior Court.] Francis A. Campbell, Clerk.

57 [Title omitted.]

DOCKET ENTRIES.

[July 22, 1922.]

[Title omitted.]

Plaintiff's Counsel: John R. Lazenby, Hale & Dorr. Dec. 7, 1920.
Defendant's Counsel: Julius Nelson, Samuel O. Reinstein, Dunbar, Nutter & McClennen, for Myers. June 2, 1919.
Trustees: 1. First National Bank. 2. Commonwealth Trust Company. 3. —— ——. 4. —— ——.
Trustees' Counsel: 1. Blodgett, Jones, Burnham & Bingham. 2. Gaston, Snow & Saltonstall. 3. —— ——. 4. —— ——.
Action of Tort.
Ad Damnum, $25,000.
J.
Trial List.

Date.	No.	
1917.		
Dec. 3.	1.	Entered—Declaration filed.
Dec. 3.	1.	Answer of Trustee First National Bank.
Dec. 6.	2.	Defendants' Jury Claim.
Dec. 11.	3.	Answer of Trustee Commonwealth Trust Company.

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1917.		
Dec. 29.	4.	Answer of Defendant by consent.
1919.		
Mar. 27.	5.	Defendants' amended answer by consent.
1921.		
Mar. 2.	6.	Verdict for the Plaintiff for $14,304.49.
Mar. 18.	7.	Time for filing Defendants' exceptions extended to May 1, 1921.
Apr. 28.		Defendants' Exceptions proposed.
June 23.	8.	Time for allowance of exceptions extended to October 1, 1921.
July 29.	—.	Notice to all attorneys and to Dubuque J. under Rule 54.
Aug. 30.	9.	Defendants' exceptions allowed and filed.

1922.
June 15. 10. Rescript from Supreme Judicial Court, "Exceptions overruled."
(July 22, 1922.)

Copy. Attest. [Seal of the Superior Court.] Francis A. Campbell, Clerk.

59 COMMONWEALTH OF MASSACHUSETTS:

Boston, July 1, 1922.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of International Trust Co. vs. Samuel A. Myers, decided on the 15th day of June, 1922. Ethelbert V. Grabill, Reporter of Decisions.

60 [Title omitted.]

OPINION.

(Filed June 15, 1922.)

BRALEY, *J.*: The defendants, manufacturers and sellers of clothing, were depositors of the plaintiff from which from time to time for a number of years they borrowed money for use in their business. The plaintiff before making loans required of the defendants and they submitted each year a statement of their financial condition which supplied the necessary information on which the plaintiff could determine whether the credit solicited could safely be given. The defendants March 27, 1916, having furnished such statement received on their promissory notes for two thousand dollars each, twenty thousand dollars, and in 1917 while the notes were still unpaid became bankrupt, and offered a composition to their creditors. The plaintiff proved its claim on the notes and received the dividend. And the composition having been confirmed, the defendants were discharged from their debts "other than those agreed to be paid by the terms of the composition and those not affected by a discharge." The United States Bankruptcy Act of 1898, s. 12, s. 14, sub, s. e. But s. 14 (3) provides that "where a bankrupt has obtained money or property on credit upon a materially false statement in writing made by him to any person * * * for the purpose of obtaining credit from such person" the discharge is not a bar to a subsequent suit by the party defrauded to recover damages for deceit. The plaintiff accordingly sues in tort to recover as damages the difference between the dividend received and the face of the notes. The first question is whether there was evidence which warranted the jury in finding that the statement submitted was known to the defendants to be false, and that because of the fraud practiced
61 upon it the plaintiff was induced to lend the money. The statement signed by the defendants purported on its face to be a copy of "our financial condition taken from the inventory of January 1, 1916," and among other assets showed accounts receivable amounting to $58,425.66. The evidence need not be reviewed

in detail. There was plenary proof that when the statement was furnished and accepted the Commercial Investment Company held a valid assignment of the accounts receivable as collateral security for money advanced on merchandise sold and shipped by the defendants to customers on which upon receiving duplicate invoices the investment company lent them eighty per cent. of the amount shown by the invoice, for which it charged interest at the rate of sixteen per cent. a year. The defendants Samuel A. Myers, managing partner of the firm, called by the plaintiff as a witness testified, that he did not at any time disclose to the plaintiff the existence of this agreement although he had previously received a letter from the plaintiff's vice-president stating that "We have received no statement since January 1, 1915," and requesting that "you send us on the enclosed form statement of your financial condition which statement is for our exclusive use and will be treated as strictly confidential," and in response he signed and submitted the itemized statement on which the loans were obtained. The jury could find the defendants intended that the plaintiff in ignorance of the true state of affairs should rely and act on the statement or representations therein contained, and that the plaintiff was thereby misled. The evidence of the vice-president descriptive of the previous and similar course of dealing between the parties in the procurement of loans, and that if he had been informed of the assignment, and of the rate of interest payable thereunder he would not have made the loans in question, and the admission of a printed form of statement
62 to be made by the borrower, a copy of which even if the original was not produced, the jury could find had been enclosed in a letter sent by him to the defendants although not used by them, was competent for the consideration of the jury as showing, that if he had known the truth, or if the misrepresentations had not been made, the money would not have been lent. The plaintiff was not only deceived, but acted in reliance on the false statement. The admission of the answer of the witness Myers to the question "Didn't you know that the bank was trying to find out the condition of your business financially?" Well, I presume so. I do not know what was in their minds," also was admissible. It was relevant on the question whether the statement was false and the defendants knew that it was false. The concealment of material facts with intention to mislead and defraud stands no better than the affirmation of a material misrepresentation. We refer only to a few cases sustaining what has been said on this branch of the case. Safford v. Grout, 130 Mass. 20. Stewart v. Joyce, 201 Mass. 301, 310, 311, and cases there cited. Robinson v. Richards, 209 Mass. 295. Harvey v. Squire, 217 Mass. 411, 416. Warfield v. Wood, 14 Wend. 126. Stubly v. Peachboard, 68 Mich. 49. But even if the debt having been fraudulently contracted was not discharged by the proceedings in composition, and the plaintiff was entitled to go to the jury on the issue of fraud and misrepresentation, Friend v. Talcott, 228 U. S. 27; Talcott v. Harris, 93 N. Y. 567, the amended answer pleads in bar, "that in proceedings originally instituted in the United States District Court for the District of Massachusetts on the twenty-

seventh day of January, 1917, * * * the plaintiff in this action participated in said bankruptcy proceedings, and filed his objections to the confirmation of the composition, a copy of which objections is hereto annexed and made a part of this answer, and
63 raised the same issues as now sued on by the plaintiff in this action, which issues were heard between the parties and determined in favor of the present defendants; that all matters and things contained in this suit were adjudicated upon in said suit * * * and appealed by the plaintiff to the Circuit Court of Appeals * * * and all matters and things contained in this suit were adjudicated upon and finally determined in favor of the defendants." The transcript of these proceedings which plainly was admissible, Foye v. Patch, 132 Mass. 105, leaves no doubt that the plaintiff appeared and opposed the granting of the defendants' discharge on substantially the same grounds now relied on to sustain an action for deceit, and introduced evidence and was fully heard in support of its contention. The District Court found in so far as material here, "that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge," and entered an order of confirmation of the composition. The plaintiff appealed to the Circuit Court of Appeals which sent down a mandate affirming the order of the District Court. International Trust Co. v. Myers, 245 Fed. 110, 112. The second question therefore is, whether the order confirming the composition is conclusive, that the representations were neither false nor fraudulent within the purview of the bankruptcy act. We are unable in principle and on the material facts to distinguish the case at bar from Friend v. Talcott, 228 U. S. 27. The facts in that case were that a partnership composed of the plaintiff Friend and others was adjudicated bankrupt and offered a composition. The defendant Talcott, a creditor who proved and had allowed a claim in contract, opposed confirmation of the composition, on the ground that the bankrupts had obtained credit from him by reason of false
64 reports of the financial condition of the firm. The objections, however, were not sustained because the false statement was made to a commercial agency instead of being directly made to Talcott, and the composition was confirmed. Talcott then brought an action to recover damages suffered by reason of the alleged false representations which had been passed upon in the composition proceedings. The defendants pleaded the general issue, and that the plaintiff was precluded by the former adjudication. Talcott v. Friend, 179 Fed. 676. The plaintiff having prevailed the defendants petitioned for a writ of certiorari, which having been granted, the case was heard and determined on the record the substance of which has been stated. The opinion by Chief Justice White, after pointing out that Talcott's participation in the composition could not defeat the action, disposes of the issues of res judicata in these words, "To constitute res judicata, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankruptcy law, the distinction which it makes between the general discharge and the right of a particular creditor

to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (Sec. 14c, 30 Stat. 550) authorizing a general discharge as the result
65 of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge' * * *"

"Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to res judicata. The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformably to the statute as to the absence or fraud or other wrongdoing, * * * is but a reiteration of the contention as to res judicata which we have shown to be without foundation." The presiding judge rightly refused the defendants' first request, that on all the evidence the plaintiff could not recover. The eighth request that the mere failure to state that the accounts had been assigned as collateral security to the Commercial Investment Company would not make the statements false, could not be given. The question of the defendants' deceit was for the jury on all the evidence. The tenth, eleventh and twelfth requests asking for rulings that the finding of the the court at the trial of the plaintiff's objections to the confirmation of the composition establishes
66 & 67 conclusively for the purposes of the present case that the statements were not false, and that it was not made with intent to deceive, and that the discharge of the defendants is a bar to this action, were inaccurate statements of the law applicable to the case for reasons previously stated. The jury also were rightly permitted to compute interest on damages from the date of the writ to the date of verdict. The amount recoverable which could be calculated had been obtained and withheld from the plaintiff by the defendants' fraud. The jury, accordingly could consider these circumstances and in their discretion increase the damages by the ad-

dition of interest. Frazier v. Bigelow Carpet Co., 141 Mass. 126, 127, 128. Peabody v. New York, New Haven & Hartford Railroad, 187 Mass. 489, 492, 493.

Exceptions overruled.

68 [Endorsed:] International Trust Co. vs. Myers. Certified copy of the opinion of the Suprmee Judicial Court.

68*a* **EXHIBIT A FOR IDENTIFICATION.**

United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1289.

INTERNATIONAL TRUST COMPANY, Creditor, Appellant,

v.

SAMUEL A. MYERS et al., Bankrupts, Appellees.

In the Matter of SAMUEL A. MYERS et al., Bankrupts.

Appeal from the District Court of the United States for the District of Massachusetts from Final Decree (Morton, J.), May 28, 1917.

TRANSCRIPT OF RECORD.

John R. Lazenby, for Appellant. Samuel O. Reinstein, Julius Nelson, for Appellees.

Filed in Clerk's Office, U. S. Circuit Court of Appeals for the First Circuit, Jun. 23, 1917.

68-1 United States Circuit Court of Appeals for the First Circuit, October Term, 1916.

No. 1289.

INTERNATIONAL TRUST COMPANY, Creditor, Appellant,

v.

SAMUEL A. MYERS et al., Bankrupts, Appellees.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 24571. In Bankruptcy.

In the Matter of SAMUEL A. MYERS et al., Alleged Bankrupts.

PETITION FOR MEETING TO CONSIDER COMPOSITION.

[Filed February 10, 1917, at 11.30 a. m.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts:

The above-named bankrupts respectfully represent that a composition of 40 per cent upon all unsecured debts not entitled to a priority, 20 per cent in cash and two notes for 10 per cent each, payable in three and four months from date, in satisfaction of their debts, is to be proposed before adjudication by them to their creditors, as provided by the Acts of Congress relating to bankruptcy, and they verily believe that the said composition will be accepted by a majority in number and in value of their creditors whose claims are allowed.

68-2 Wherefore, they pray that a meeting of their creditors may be duly called to act upon said proposal for a composition, according to the provisions of said Acts and the rules of court. Samuel A. Myers. Harry Myers.

Subscribed and sworn to before me this twelfth day of February A. D. 1917. Samuel O. Reinstein, Justice of the Peace.

ORDER OF REFERENCE.

February 12, 1917.

At Boston, in said district, on the twelfth day of February A. D. 1917, this case, with the petition for a meeting to consider an offer in composition, is hereby referred to Emery B. Gibbs, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are authorized by the Act and as in his judgment may be necessary or advisable for the preservation and conduct of the estate or business of the said alleged bankrupts, including the appointment of receivers and appraisers, if necessary; to hear and determine all matters of fact relating to said meeting and the proposed offer in composition; to call such meetings, give such notices, make such further orders as may be necessary in the premises while said petition and offer in composition are pending, and to file his report under this order within forty days hereafter.

Witness the Honorable James M. Morton, Jr., Judge of said court, and the seal thereof, this twelfth day of February A. D. 1917. Mary E. Prendergast, Deputy Clerk.

OFFER OF COMPOSITION.

[Filed March 3, 1917.]

To the Honorable James M. Morton, Jr., Judge of said Court:

Respectfully represents Samuel A. Myers, of Boston in the County of Suffolk in said District, and Harry Myers, of Brookline in the County of Norfolk, and district aforesaid:—that the said

68-3 Samuel A. Myers and Harry Myers have been examined in open court at a meeting of their creditors, that they have filed in court a schedule of their property and a list of creditors to

be filed by bankrupts; and that they now offer the following terms of composition before adjudication to creditors, to wit:

To pay all claims entitled to priority in full, and to pay all unsecured creditors forty cents on the dollar of their just claims, 20 per cent in cash and two notes for 10 per cent each, payable in three and four months, respectively.

The consideration to be thus paid, and the money necessary to pay all debts which have priority and the cost of the proceedings, to be deposited in the National Merchants Bank of Boston, in accordance with the law in such cases. Samuel A. Myers. Harry Myers.

REFEREE'S REPORT ON COMPOSITION.

[Filed March 23, 1917.]

At Boston, in said district, on the tenth day of February A. D. 1917, the above-named bankrupt, after having been examined as required by law, offered terms of composition of 20 per cent and 20 per cent notes on all unsecured claims, and the said terms were accepted by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; and the consideration to be paid by the bankrupt to his creditors; and the money necessary to pay all debts which have priority; and the amount of costs of proceedings, the total amount being twenty-one thousand, six hundred and twenty-six and 08/100 dollars ($21,626.08) has been deposited in the Merchants National Bank of Boston, Mass., a designated depository for the money of bankrupt estates; and I recommend the confirmation of the composition. Emery B. Gibbs, Referee.

68-4 APPLICATION FOR CONFIRMATION OF COMPOSITION.

[Filed March 23, 1917, at 11 a. m.]

To the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts:

At Boston, in said district, on the twenty-third day of March, A. D. 1917, now comes Samuel A. Myers and Harry Myers, the above-named alleged bankrupts, and respectfully represent to the court that, after they had been examined in open court (or at a meeting of their creditors) and had filed in court a schedule of their property and a list of their creditors, as required by law, they offered terms of composition to their creditors, which terms have been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number represents a majority in amount of such claims; that the consideration to be paid by the alleged bankrupts to their creditors, the money necessary to pay all debts which have priority, and the costs of the proceedings, amounting in all to the sum of twenty-one thousand six hundred twenty-six and 08/100 dollars ($21,626.08) has been deposited, subject to the

order of the judge, in the Merchants National Bank of Boston, a designated depository of money in bankruptcy cases.

Wherefore the said Samuel A. Myers and Harry Myers respectfully ask that the said composition may be confirmed by the court. Samuel A. Myers, Harry Myers, Alleged Bankrupts, by their Attorney, Samuel O. Reinstein.

OBJECTION TO CONFIRMATION OF COMPOSITION.

[Filed March 9, 1917, at 12 m.]

In the above cause I appear for the International Trust Company in opposition to the acceptance of the composition offered by the debtors. John R. Lazenby, 57 Equitable Building.

68-5 **SPECIFICATIONS OF GROUNDS OF OPPOSITION TO ALLEGED BANKRUPTS' PETITION FOR CONFIRMATION OF COMPOSITION.**

[Filed March 9, 1917, at 12 m.]

The International Trust Company, of Boston, in the County of Suffolk, and Commonwealth of Massachusetts, a party interested in the estate of said S. A. and H. Myers, alleged bankrupts, does hereby oppose the allowance of their petition for confirmation of the composition and for grounds of such opposition file the following specifications:

On or about the tenth day of May, 1916, the above-named alleged bankrupts obtained on credit the sum of $2,000. On or about the second day of October, 1916, the above-named alleged bankrupts obtained the sum of $2,000. On or about the eighth day of December, 1916, the above-named alleged bankrupts obtained the sum of $2,000. On or about the eleventh day of December, 1916, the above-named alleged bankrupts obtained the sum of $2,000. On about the thirteenth day of December, 1916, the above-named alleged bankrupts obtained the sum of $2,000. On or about the fifteenth day of December, 1916, the above-named alleged bankrupts obtained the sum of $2,000. On or about the eighteenth day of December, 1916, the above-named alleged bankrupts obtained the sum of $2,000; and they obtained said sums by the statement made in writing to the International Trust Company that on the first day of January, 1916, the accounts receivable amounted to $58,425.06; that the alleged bankrupts in said statement set out that they owed notes payable amounting to $59,713.12; that the alleged bankrupts did not include in the said item of notes payable a note of $3,000 secured by a mortgage of certain real estate and said statement was materially false and was made for the purpose of obtaining the aforesaid sums on credit. International Tust Company, by Chester B. Pierce, Assistant Treasurer.

68-6 March 8th, 1917.

Then personally appeared Chester B. Pierce, assistant treasurer of the International Trust Company, being first duly sworn, upon his oath says that the facts set forth in the foregoing specifications are true to the best of his knowledge and belief. Howard Norton, Notary Public. [Seal.]

PETITIONS FOR LEAVE TO AMEND SPECIFICATIONS AND ORDER THEREON.

[Petitions Filed April 27, 1917, at 10 p. m.; Order Entered May 14, 1917.]

Petition to Amend Specifications of Grounds of Opposition for Confirmation of Composition.

Now comes the International Trust Company and asks leave to amend its specifications of grounds of opposition to alleged bankrupts' petition for confirmation of composition by adding thereto the following further grounds of opposition, the reason for this petition being that the information concerning the matters hereinafter set forth were unknown to the said International Trust Company until April 18, 1917, said grounds being as follows:

On or about the second day of January, 1917, S. A. Myers, one of the alleged bankrupts, for the purpose of hindering, delaying and defrauding his creditors, transferred to his wife certain of his property as follows: Policy No. 288,881 for $10,000 of the Connecticut Mutual Life Insurance Company on the life of the said S. A. Myers and payable previous to said January 2, 1917, to his estate, said policy having a cash surrender value of $932. Policy No. 288,882 for $10,000 of the Connecticut Mutual Life Insurance Company on the life of the said S. A. Myers and payable previous to January 2, 1917, to the estate of S. A. Myers, said policy having a cash surrender value of $646.20.

That on or about the second day of January, 1917, the alleged bankrupt Harry Myers, for the purpose of hindering, delaying and defrauding his creditors, transferred to his wife certain of his property as follows: Policy No. 256,787 of the Connecticut Mutual Life Insurance Company for $5,000, payable to the estate of
68-7 the said Harry Myers, said policy having a value of $650. Policy No. 256,788 of the Connecticut Mutual Life Insurance Company for $5,000 on the life of the said Harry Myers, said policy being previous to January 2, 1917, payable to the estate of the said Harry Myers and having a value of $650. Policy No. 270,731 of the Connecticut Mutual Life Insurance Company for $5,000 on the life of the said Harry Myers, said policy being previous to January 2, 1917, payable to the estate of the said Harry Myers and having a value of $450. Policy No. 270,732 of the Connecticut Mutual Life Insurance Company for $5,000 on the life of the said Harry Myers, said policy being payable previous to January 2, 1917,

to the estate of the said Harry Myers and having a value at said date of $450.

And for further specifications the said International Trust Company says that on or about the last day of February, 1917, in the examination of the said S. A. Myers, alleged bankrupt, before Daniel Harris and Sydney R. Wrightington, receivers, the bankrupt herein knowingly and fraudulently made a false oath, to wit: Said alleged bankrupt stated that all insurance policies upon his life were payable to his wife, whereas the truth and fact were, as said bankrupt well knew, that there was a policy for $20,000 of the Connecticut Mutual Life Insurance Company on the life of the said S. A. Myers payable by assignment to the partnership of S. A. and H. Myers, which testimony was material in that it pertained to the discovery of property of the alleged bankrupts.

That on the first day of March, 1917, in the examination of Harry Myers, alleged bankrupt, before Daniel Harris and Sydney R. Wrightington, receivers, in the bankruptcy proceedings, the alleged bankrupt, herein knowingly and fraudulently made a false oath in said proceedings, to wit: Alleged bankrupt stated that all policies of insurance upon his life were payable to his wife, whereas the truth and fact were, as alleged bankrupt well knew, that there was a policy for $20,000 of the Connecticut Mutual Life Insurance Company payable by assignment to the firm, which testimony was material in that it pertained to the discovery of the property of the bankrupt.

68-8 And for further specification the said International Trust Company says that on or about the ninth day of February, 1917, in the bankruptcy proceedings, the alleged bankrupts, herein, knowingly and fraudulently made a false oath in said proceedings in bankruptcy as follows: Said bankrupts omitted the following described property in their schedules and yet did then and there knowingly and fraudulently make oath to said schedules that they were a true statement of their assets, whereas the truth and fact were, as the alleged bankrupts well knew, that there were two policies each for $20,000 of the Connecticut Mutual Life Insurance Company payable by assignment to the said firm of S. A. and H. Myers, which omission was material in that it pertained to the discovery of the acts, conduct and property of the bankrupts and said property so omitted was their property and was of value. International Trust Company. Chester B. Pierce, Assistant Treasurer.

SUFFOLK, *ss:*

April 20, 1917.

Then personally appeared Chester B. Pierce, assistant treasurer of the International Trust Company, being first duly sworn, upon his oath says that the facts set forth in the foregoing amendment of specifications are true to the best of his knowledge and belief.

Before me, A. Francis Hayden, Notary Public. [Seal.]

PETITION FOR LEAVE TO AMEND SPECIFICATIONS.

And now comes the International Trust Company, of Boston, and asks leave to amend its original specifications of grounds of opposition to alleged bankrupts' petition for confirmation of composition by adding thereto at the end of the first paragraph on the second page the following: Said falsity being that the alleged bankrupts concealed and omitted to set forth in said statement the fact that of the said accounts receivable a certain portion in the neighborhood of twenty thousand (20,000) dollars, the exact sum being unknown to your petitioner, had been assigned and set over to the Commercial Investment Trust, and, further, that the ac-
68-9 counts receivable, as set forth in said statement, do not amount to the sum of fifty-eight thousand four hundred twenty-five and 06/100 (58,425.06) dollars. International Trust Company. Chester B. Pierce, Assistant Treasurer. Boston, Mass., April 24, 1917.

Then personally appeared Chester B. Pierce, assistant treasurer of the International Trust Company, being first duly sworn, upon his oath says that the facts set forth in the foregoing petition are true to the best of his knowledge and belief. A. Francis Hayden, Notary Public. [Seal.]

Upon the foregoing petitions after hearing John R. Lazenby, Esq., counsel for the petitioner, and no one appearing to object: It is ordered that said motions be and they hereby are granted. By order of Court May 14, 1917. Mary E. Prendergast, Deputy Clerk.

Referred to Referee E. B. Gibbs to ascertain and report facts. By order of Court, May 14, 1917. Mary E. Prendergast, Deputy Clerk.

ORDER REFERRING OBJECTIONS TO EMERY B. GIBBS.

April 14, 1917.

At Boston, in said district, on the fourteenth day of April, A. D. 1917, the petition for confirmation offer made by the above-named bankrupt and the objections thereto are hereby referred to Referee Emery B. Gibbs to ascertain and report facts.

Witness the Honorable James M. Morton, Jr., Judge of the said Court, and the seal thereof, this fourteenth day of April, A. D. 1917. Mary E. Prendergast, Deputy Clerk.

68-10 **REFEREE'S REPORT.**

[Filed May 24, 1917, at 9 a. m.]

Pursuant to the order of the court I have heard the parties, their evidence and arguments of counsel, and submit the following report:

The alleged bankrupts are co-partners carrying on business under the firm name and style of S. A. & H. Myers.

On February 10, 1917, they filed a petition for a meeting of creditors to consider an offer in composition before adjudication. Receivers were appointed, an appraisal made, and a majority of creditors in number and amount accepted the offer of composition.

The receivers have reported that it is for the interest of the creditors that the offer be confirmed.

The International Trust Company, a creditor, filed the following specifications of objection to the bankrupts' petition for confirmation of their offer in composition:

1. That the bankrupts obtained on credit from the International Trust Company money upon a materially false statement made in writing.

2. That said bankrupts on or about the second day of January, 1917, for the purpose of hindering, delaying and defrauding creditors, transferred to their wives certain policies of life insurance.

3. That the alleged bankrupts, at an examination before the receivers, knowingly and fraudulently made a false oath.

4. That the alleged bankrupts concealed and omitted to set forth in said statement the fact that certain accounts receivable had been assigned and set over to the Commercial Investment Trust.

For convenience, the several specifications of objection will be considered separately.

First. The materially false statement in writing referred to in first objection was offered in evidence and is as follows:

"March 27, 1916.

International Trust Co., Boston, Mass.

GENTLEMEN: The following is a copy of our Financial statement, taken from Inventory January 1st, 1916.

68–11	Mdse. in Stock & in process of manufacture....	147,289.53
	Cash on hand & in Bank	4,777.62
	Accounts Receivable	58,425.06
	Mchy. & Fixtures	8,833.96
		219,326.17
	Accounts payable	76,102.72
	Notes payable	59,713.12
	Net capital	83,510.33
		219,326.17

Yours very truly, S. A. & H. Myers, S. A. Myers."

This statement was given to Mr. Jewett, vice-president and secretary of the International Trust Company, the objecting creditor, on the 27th of March, 1916, and was relied upon when the notes of the alleged bankrupts were presented for discount on the dates set forth, viz., October 2, 1916, to and including December 18, 1916. Failure to include in the statement a note for $3,000, secured by mortgage

of real estate, is the specific charge relied upon in this specification of objection.

From the evidence, it appeared that the bankrupts several years before January 1, 1916, purchased real estate in Stoughton for $4,000, and at the time of the purchase gave a mortgage to the Stoughton Trust Company in the sum of $3,000 to secure a note for the latter amount. This note of $3,000 had never been carried on the books of the firm, nor had the real estate purchased been entered upon their books.

The only evidence offered was to the effect that the real estate is fairly worth $4,000. Therefore the possible liability on the note in case of foreclosure is remote. It is certain that the holder of this note of $3,000 secured by mortgage on real estate is not a proper party to the composition, nor is it a necessary party. In that view, no harm has come to the objecting creditor by the omission of the mortgage note of $3,000 from the books of the bankrupts and from the statement above referred to. This note was not treated
68-12 by the bankrupts as a commercial note. The statement was a true financial statement from their books January 1, 1916, as kept in the regular course of business, and no change was made in the books for the purpose of preparing this statement. It also appeared that there had been no communication between the bankrupts and the objecting creditor since the statement was given, March 27, 1916, and at no time was the statement a subject of discussion in connection with any of the loans made either by the officers of the International Trust Company or with the bankrupts.

The statute, Section 14*b* (3), is as follows: "Obtain money and property on credit upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such persons."

To prevent a discharge, the statement must be materially false and made by the bankrupt knowing that it was false, or made so recklessly and carelessly that it was made without an honest belief that it was true and correct; in other words, it must have been made materially false with the purpose of misleading or deceiving the creditor to whom it was presented, and so obtain goods or money on credit. It is clear that there must be an intent on the part of the alleged bankrupt to defraud, otherwise the words in the statute "for the purpose" would have no force or meaning. This objection, to be sufficient to prevent the confirmation of the offer in composition, must be sufficient to bar a discharge from bankruptcy, and it has been frequently held by the court that to bar a discharge in bankruptcy such a statement must be materially false and knowingly or intentionally untrue.

Upon all the evidence, I find that the omission from said statement of the $3,000 note secured by mortgage on real estate of the value of $4,000, which was also omitted from the books as an asset was not omitted for the purpose of misleading or deceiving the creditors, nor does it make the statement materially false, and therefore I find that this objection is not sustained.

Second. That S. A. Myers, one of the copartners, for the purpose of hindering, delaying and defrauding his creditors, trans-

ferred by assignment to his wife two life insurance policies
68-13 having a surrender value of $1,578.20, and that Harry Myers, the other of said partners, transferred by assignment to his wife four life insurance policies having a surrender value of $2,200.

All of these policies were issued several years before these assignments, which were made on or about January 2, 1917.

Both of the alleged bankrupts testified that they had always supposed that these policies were made payable to their wives when issued, and as soon as their attention was called to the fact that these several policies were payable to their estates they went to the office of the life insurance company in Boston where the assignments of these several policies were made as above set forth.

In Massachusetts, under the facts disclosed, and in the absence of any fraud, the bankrupts had a right to make such assignments. I therefore find that this objection is not sustained by the evidence.

Third. That in the examination before the receivers the bankrupts knowingly and fraudulently made a false oath, to wit: "that all the insurance policies upon their lives were payable to their wives, whereas the truth and facts were, as the bankrupts well knew, that each had a policy of $20,000 on his life payable by assignment to the firm, which testimony was material in that it pertained to the discovery of the property of the bankrupts."

The bankrupts both testified that they had supposed and believed that all their life insurance policies were payable to their wives at the time the schedules were prepared and sworn to; that when they went to the office of the life insurance company on or about January 2, 1917, they both intended to assign all policies payable to their wives, and that the two policies payable to the partnership were overlooked by the bankrupts in making up their schedules. It also appeared that the bankrupts immediately filed an amendment to their schedules setting forth the fact as soon as their attention was called to these policies.

Both of the bankrupts appeared before me and from their testimony I am satisfied that there was no attempt on their part to conceal these policies. The presumption of an honest purpose and intent on the part of the bankrupts has not been overcome by any evidence offered.

68-14 I therefore find and so report that this objection is not sustained by the evidence.

Fourth. That the alleged bankrupts concealed and omitted to set forth in said statement the fact that certain accounts receivable had been assigned and set over to the Commercial Investment Trust.

It appeared from the testimony that the alleged bankrupts on July 22, 1915, executed a contract with the Commercial Investment Trust, whereby the bankrupts were to assign accounts receivable as collateral security for an advance in the nature of a loan of 80 per cent of the face of the accounts so assigned. Various accounts had been assigned from time to time by the alleged bankrupts to said trust. The assigned accounts were carried on the

bankrupts' books as "accounts receivable" until paid, and the 80 per cent loan or advance by the trust was carried on the books and accounts of the alleged bankrupts as "accounts payable." This had been the regular method of keeping the books by the bankrupts up to January 1, 1916. Some time thereafter the method of keeping these accounts upon their books was changed at the suggestion of the Commercial Investment Trust. When the financial statement showing the condition of the bankrupts above referred to was taken from their books it was a true statement and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books, kept according to the custom of the bankrupts at that time and kept by an experienced, competent bookkeeper.

If the bankrupts had credited to the account, when assigned, the 80 per cent advance which they then received as a part payment of that account so assigned to the Commercial Investment Trust, instead of treating it as a loan from the Commercial Investment Trust, the accounts receivable would have been reduced by that amount and the accounts payable would be less by the same amount, but the balance between the accounts receivable and the accounts payable would remain the same as under the form or method of bookkeeping then in use by the bankrupts. I do not find any evidence that the
68-15 alleged bankrupts, or either of them, falsely and purposely concealed or omitted to set forth in said statement the amount of the accounts assigned to the Commercial Investment Trust. I therefore find and so report that according to the method of bookkeeping employed by the alleged bankrupts the amount of the accounts receivable January 1, 1916, was correctly set forth in said statement.

I therefore find and so report that this objection is not sustained. Respectfully submitted, Emery B. Gibbs, Master.

REFEREE'S SUPPLEMENTAL REPORT.

[Filed May 25, 1917, at 4 P. M.]

The specification of objection alleging that the bankrupts made a false oath in said proceedings, to wit:

"Said bankrupts omitted the following described property in their schedules and yet did then and there knowingly and fraudulently make oath to said schedules that they were a true statement of their assets, whereas the truth and fact were, as the bankrupts well knew, that there were two policies, each for $20,000, of Connecticut Mutual Life Insurance Company payable by assignment to the said firm of S. A. & H. Meyers."

This specification of objection relates to the same policies referred to in the third specification of objection in the report already on file, to which reference is hereby made for a statement of the facts as testified to before me and upon which, together with all the evidence relating to this specification of objection, I find and

so report that this specification of objection is not sustained by the evidence.

At the request of counsel, the testimony taken in the hearing before me is transmitted herewith. Respectfully submitted, Emery B. Gibbs, Master.

68-16 **ORDER CONFIRMING COMPOSITION.**

May 28, 1917.

An application for the confirmation of the composition offered by the bankrupts having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed and of such allowed claims; and the consideration and the money required by law to be deposited having been deposited as ordered in such place as was designated by the judge of said court, and subject to his order; and it also appearing that it is for the best interest of the creditors; and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the Acts of Congress relating to bankruptcy; it is therefore hereby ordered that the said composition be, and it hereby is, confirmed.

Witness, the Honorable James M. Morton, Jr., Judge of said court, and the seal thereof, this twenty-eighth day of May, A. D. 1917. Mary E. Prendergast, Deputy Clerk.

MEMORANDUM OF DECISION ON CONFIRMATION OF COMPOSITION.

June 5, 1917.

MORTON, *J.*: At the conclusion of the hearing I orally stated my opinion substantially as follows:

The objections chiefly relied upon in argument are based upon the statement of financial condition made by the alleged bankrupts to the objecting creditor. It was given to the creditor on March 27, 1916, at the latter's request and purported to state the financial condition of the alleged bankrupts as it appeared on their books on January 1, 1916. The referee finds that there was no borrowing on the strength of the statement until October 2, 1916, and that the statement was a correct abstract of the respondents' books; and these findings are not disputed.

68-17 The objecting creditor, in support of the contention that the statement was intentionally false, relies principally upon two matters. The first of these is the omission altogether from it of a note for $3,000, made by the alleged bankrupts and secured by a mortgage on their real estate in Stoughton. The respondents owned real estate in Stoughton and mortgaged it for $3,000 to the Stoughton Trust Company. They did not include this mortgage indebtedness in their statement. Neither did they include the

value of the real estate, which appears to have been more than the amount of the mortgage. They apparently supposed that the statement covered only their commercial business, and that the Stoughton real estate was outside of it. If the real estate had been shown as an asset, and the mortgage indebtedness as a liability, the result would have been an increase in the net worth of the respondents.

The other item relied upon by the objecting creditor is the "Accounts Receivable", which are given in the statement as $58,425.06. That the respondents had on their books accounts receivable of that amount is not disputed. At the date of the statement, however, $27,000 of these accounts had been assigned to the Commercial Investment Trust, which had advanced 80 per cent. of the face value thereof. Further adjustments were to be made between the respondents and the Commercial Investment Trust in respect to the other 20 per cent. The respondents included as assets in their "Accounts Receivable" the $27,000 of accounts so assigned; on the other side they included in their liabilities as debts the sums received on the assigned accounts.

The objecting creditor contends that the accounts in question, having been absolutely assigned, were no longer the property of the respondents, and could not properly be included as assets; that the sums received upon said accounts were payments of the accounts pro tanto, and were not loans to the respondents; that the statement was therefore false; and that as the respondents knew all the facts, they are fixed with knowledge of the falsity. The facts as found by the referee hardly support this view of the transactions between the respondents and the Commercial Investment Trust; but the case does not, I think, turn upon a close and exact analysis of these transactions.

68–18

A false statement of the character here in question (B. A. Sec. 14*b* (3) in order to be a bar to a discharge must have been made with knowledge that it was false, and with the actual intent to obtain property or credit by means of a false statement. The learned referee has found, in substance, that the respondents did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit. I am asked to disregard his findings and to hold that he was plainly wrong in his views. I am not prepared to do so. There is no persuasive evidence of dishonesty. It seems to me that the learned referee, who saw the respondents and heard them testify, and was in a much better position than I am to decide correctly whether there was a dishonest purpose or intent, was probably right in his conclusions on this point.

The objecting creditor urges that if the assignment of almost half of the accounts receivable had been disclosed to it, credit would not have been extended; that there was a duty on the part of the respondents, when called upon for a statement of financial condition, to state the fact of the assignments; and that the statement, not disclosing such fact, was therefore knowingly and intentionally false. The short answer is that if the objecting creditor considered that point material, it ought to have inquired about it. The state-

ment shows on its face what it is. It ought not to be extended by implication to include recitals which it does not contain, and which were never made by the alleged bankrupts.

The other objections relied on are based upon alleged false statements made by the respondents in the schedules, and on their examinations. Both in the original schedules, and on the examinations before the receivers, each respondent stated under oath that all his policies of life insurance were payable to his wife. The facts were that on the life of each respondent was a $20,000 policy payable to the firm. After the examination the schedule was amended to show these facts. Various policies of life insurance owned by the respondents had been assigned to their wives on Janu-
68–19 ary 2, 1917. The explanation offered by the respondents for their failure to refer to the $20,000 policies in their schedules and in their examinations was that each of the respondents supposed that his $20,000 policy had been assigned to his wife at the time when his other policies were so assigned. The learned referee accepted the explanation offered, and does not find any intentional concealment or mis-statement in respect to these two policies. It cannot be said that in this conclusion he was clearly in error. The other specifications of objection based on the policies of insurance are waived by the objecting creditor.

No sufficient reason appearing for disregarding any of the learned referee's findings, his report stands confirmed.

Offer in composition approved.

PETITION FOR APPEAL.

[Filed June 7, 1917.]

The International Trust Company, a creditor of the alleged bankrupts, considering it is aggrieved by the order rendered on the twenty-eighth day of May, 1917, hereby petitions in an appeal in said decree to the United States Circuit Court of Appeals for the First Circuit and that a transcript of the record and a copy of the opinion of the court filed in said case may be presented to the United States Circuit Court for the First Circuit and that a citation be issued to Samuel A. and Harry Myers, alleged bankrupts, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the First Circuit on the seventh day of July, 1917, pursuant to said appeal. By its Attorney, John R. Lazenby. June 7, 1917. Appeal allowed. James M. Morton, Jr.

68-20 **ASSIGNMENTS OF ERROR.**

[Filed June 7, 1917.]

And now comes the International Trust Company, a creditor objecting to the confirmation of the offer in composition, and makes and files these assignments of error:

1. The court erred in refusing to find that the objecting creditor, the International Trust Company, in giving credit of the sum of $20,000 relied on the statement of the financial condition of the alleged bankrupts, Exhibit 1.

2. The court erred in refusing to find that the statement of their financial condition, Exhibit 1, was given by the alleged bankrupts to the International Trust Company for the purpose of obtaining credit.

3. The court erred in finding that "neither did they include [in Exhibit 1] the value of the real estate which appears to have been more than the amount of the mortgage. They apparently supposed that the statement covered only their commercial business and that the Stoughton real estate was outside of it. If the real estate had been shown as an asset and the mortgage indebtedness as a liability, the result would have been an increase in the net worth of the respondents."

4. The court erred in refusing to find that the omission of the mortgage note of $3,000 from the statement, Exhibit 1, from the liabilities was a material false statement.

5. The court erred in refusing to find that the omission of the mortgage note of $3,000 from the statement, Exhibit 1, from the liabilities was a material false statement and the statement known to the alleged bankrupts to be false.

6. The court erred in finding that the omission of the $3,000 mortgage note from the liabilities from the statement, Exhibit 1, was not a material false statement and the statement known to the alleged bankrupts to be false.

7. The court erred in finding that the Commercial Investment Trust had advanced 80 per cent of the face value of the $27,000 of the accounts receivable.

68-21 8. The court erred in finding that "the objecting creditor contends that the accounts in question, having been absolutely assigned, were no longer the property of the respondents and could not properly be included as assets; that the sums received upon said accounts were payments of the accounts pro tanto, and were not loans to the respondents, that the statement was therefore false, and that as the respondents knew all the facts they are fixed with knowledge of the falsity. The facts as found by the referee hardly support this view of the transactions between the respondents and the Commercial Investment Trust, but the case does not, I think, turn upon a close and exact analysis of these transactions."

9. The court erred in finding that a "false statement of the character here in question (B. A. Sec. 14*b* 3) in order to be a bar to a discharge must have been made with knowledge that it was false, and with the actual intent to obtain property or credit by means of a false statement. The learned referee has found, in substance, that the respondents did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit. I am asked to disregard his findings and to hold that he was plainly wrong in his views. I am not prepared to do so. There is no persuasive evidence of dishonesty. It seems to me

that the learned referee, who saw the respondents and heard them testify, and was in a much better position than I am to decide correctly whether there was a dishonest purpose or intent, was probably right in his conclusions on this point."

10. The court erred in finding that "the objecting creditor urges that if the assignment of almost half of the accounts receivable had been disclosed to it, credit would not have been extended; that there was a duty on the part of the respondents, when called upon for a statement of financial condition, to state the fact of the assignments; and that the statement, not disclosing such fact, was therefore knowingly and intentionally false. The short answer is that if the objecting creditor considered that point material, it ought to have inquired about it. The statement shows on its face what it is. It ought not to be extended by implication to include
68-22 recitals which it does not contain, and which were never made by the alleged bankrupts."

11. The court erred in refusing to find that the statement, Exhibit 1, was materially false in that it failed to disclose the fact that $27,000 of the accounts receivable had been assigned to the Commercial Investment Trust.

12. The court erred in refusing to find that the statement, Exhibit 1, setting out the accounts receivable as $58,425.06 when $27,000 of the sum were assigned, was a material false statement.

13. The court erred in refusing to find that the failure of the alleged bankrupts to disclose in the statement, Exhibit 1, the fact that an assignment of the accounts receivable had been made was a material false statement.

14. The court erred in refusing to find that the failure of the alleged bankrupts to disclose in the statement, Exhibit 1, the fact that an assignment of the accounts receivable had been made was a material false statement and the statement was known to the alleged bankrupts to be false.

15. The court erred in refusing to find that the alleged bankrupts knew that the statement, Exhibit 1, was false.

16. The court erred in approving the offer of composition. By its Attorney, John R. Lazenby.

BOND ON APPEAL.

[Filed and Approved June 7, 1917.]

Know all Men by these Presents, That we, The International Trust Company, of Boston, in the County of Suffolk and Commonwealth of Massachusetts, as principal, and United States Fidelity and Guaranty Company, a Corporation duly organized under the laws of the State of Maryland and having a usual place of business in Boston, as surety, are held and firmly bound unto Samuel A. Myers and Harry Myers carrying on a partnership under the name of S. A. and H. Myers in the full and just sum of two hundred and 50/100 dollars to be paid to said S. A. and H. Myers their certain

attorney, executors, administrators or assigns: to whic
68-23 payment, well and truly to be made, we bind ourselves, ou
successors, and assigns, jointly and severally, by these pres
ents. Sealed with our seals and dated this 6th day of June in th
year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a District Court of the United States for th
District of Massachusetts in a suit in bankruptcy depending in sai
Court in re S. A. and H. Myers, alleged bankrupts, a decree wa
entered against the said International Trust Company and the sai
International Trust Company having obtained an appeal to remov
said cause to the United States Circuit Court of Appeals for th
First Circuit, to reverse the decree in the aforesaid suit, and
citation directed to the said Samuel A. Myers and Harry Myer
carrying on business as a partnership under the name of S. A. an
H. Myers citing and admonishing them to be and appear in th
said United States Circuit Court of Appeals for the First Circui
in the city of Boston, Massachusetts, on the seventh day of July
A. D. 1917.

Now, the condition of the above obligation is such, that if th
said International Trust Company shall prosecute its appeal t
effect, and answer all damages and costs if it fail to make its ap
peal good, then the above obligation to be void; else to remain in
full force and virtue. International Trust Company. J. L. Jewett
Secy. [Seal.] United States Fidelity & Guaranty Company. D
R. Pennel & M. L. Brush, True and Lawful Attorneys. [Seal.]

Sealed and delivered in presence of —— —. Approved: James
M. Morton, Jr., U. S. D. J.

68-24 **TESTIMONY.**

Appearances: John R. Lazenby, Esq., Counsel for Objecting
Creditors. Samuel O. Reinstein, Esq., and Julius Nelson, Esq.,
Counsel for Alleged Bankrupts.

Hearing on Specifications of Objections to Composition Offer.

Boston, Mass., April 20, 1917.

SAMUEL A. MYERS (Sworn).

Direct examination:

[Mr. Lazenby presents amendment, and Mr. Reinstein, attorney
for alleged bankrupts, consents to allowance of same.]

By Mr. Lazenby:

Q. 1. You were carrying on the business of S. A. & H. Myers as
office man, during the year 1916, were you not?

A. Office man?

Q. 2. Yes; weren't you in charge of the office?

A. Why, I supervised; I was in charge. You mean books,—no, sir.

Mr. Reinstein: Have you got in mind the financial part of the business?

Mr. Lazenby: I am coming to that.

Q. 3. You had charge of the manufacture of all clothing, had you not?

A. Yes, sir.

Q. 4. And also of the financial end of the business?

A. Yes, sir.

Q. 5. And you delegated to Mr. Glass the keeping of the books?

A. Yes, sir.

Q. 6. Did you also have under your supervision the factory at Stoughton?

A. Yes, sir.

Q. 7. And that factory consisted of what?

A. Of three buildings on some land, several square feet of land, machinery that was in there.

Q. 8. And you made what at that factory?

A. Principally rain coats.

68-25 Q. 9. Now, during the year 1916 did you obtain any loans from the International Trust Company?

A. Yes, sir.

Q. 10. How much?

A. During 1916, I will have to answer,—you mean the total amount?

Q. 11. How much money did you obtain from the International Trust Company during the year 1916?

A. I can't tell you; I would have to look at the books.

Q. 12. Your books will show?

A. Yes. We owed them as high as ten thousand and twenty thousand dollars at a time.

Q. 13. Your loans from the International Trust Company varied, then, from time to time, between ten annd twenty thousand?

A. They were ten thousand a greater part of the year; the latter part of the year they were twenty.

Q. 14. And do all appear on your books?

A. Yes, sir.

Mr. Lazenby: These books are here, Mr. Reinstein?

Mr. Reinstein: No; I didn't know you wanted them.

Q. 15. Did you present to the International Trust Company any financial statement of the condition of your company during the year 1916?

A. Yes, we did.

Q. 16. I show you that paper marked "Exhibit 2, C. D. B.," and ask you whether that is the statement?

A. It is.

[Statement offered in evidence by Mr. Lazenby, and marked "Exhibit 1."]

Q. 17. When was that statement made up, Mr. Myers?
A. January 1st, 1916.
Q. 18. And it is dated what?
A. It's dated that way, and was sent to the International Trust on March 27th.
Q. 19. In that statement you set out that the accounts receivable are $58,425.06 and the accounts payable are $76,102.72; notes payable, $59,713.12. Is there a mortgage, Mr. Myers, upon this property at Stoughton?
A. There is a mortgage.
Q. 20. Payable to whom?
A. Stoughton Trust Company.
Q. 21. For how much?
A. Three thousand dollars.
Q. 22. Evidenced by what? Is there a note for it?
A. I believe so.
Q. 23. Do you know?
A. Not positive.
68-26 Q. 24. When was the mortgage put on?
A. When we purchased the property.
Q. 25. When?
A. I was trying to think. I don't know; four or five years ago I should judge.
Q. 26. And you tell me that a mortgage was taken by the Stoughton Trust Company, and you don't know whether a note was given?
A. No; I'm not positive.
Q. 27. That mortgage carried what interest?
A. Five per cent, I believe.
Q. 28. And is the amount of that mortgage represented in that statement in any place?
A. No, sir.
Q. 29. In the list of assets on this statement, Exhibit 1, does the property at Stoughton appear as an asset?
A. No, sir.
Q. 30. It is true, is it not, Mr. Myers, that you had assigned certain accounts receivable to the Commercial Investment Trust?
A. Yes, sir.
Q. 31. Have you that assignment here, or a copy of it?
A. No, I haven't it here.

Mr. Lazenby: Have you got that, Mr. Reinstein?
Mr. Reinstein: I believe I have.
Mr. Lazenby: You had it.
Mr. Reinstein: I did have it. I don't know whether I have it now or returned it to Mr. Myers.
Mr. Lazenby: I would like to have that produced.
Mr. Reinstein: I will be glad to produce it if I have it. If I haven't it, I will be glad to get it.

Mr. Myers: Mr. Glass has that.

Mr. Lazenby: Before I can go much farther on that, your Honor, I would like to have the assignment.

Mr. Reinstein [to witness]: Can you get that assignment by telephone?

Mr. Myers: I think best that Mr. Glass should go for it.

Mr. Reinstein: Will you go and get it; Mr. Glass, it won't take you long.

Q. 32. Mr. Myers, were you examined before Mr. Wrightington and Mr. Harris, receivers, on or about the last of February, 68-27 1917?

A. I don't remember the date. I know there was an examination. Mr. Wrightington and Mr. Harris were present, and you also.

Q. 33. Yes. In that examination were you asked any questions concerning insurance policies?

A. Yes, sir.

Q. 34. And do you remember whether you were asked any questions concerning the ownership of those policies?

A. Yes, sir.

Q. 35. And do you remember your testimony?

A. Yes, sir.

Q. 36. What was that testimony?

A. Payable to my wife.

Q. 37. That all policies were payable to your wife?

A. Yes, sir.

Q. 38. Was that testimony a fact?

A. I found that it wasn't, since.

Q. 39. In what particular?

A. There was twenty thousand dollars that there was a binder attached to the policy that made it payable to the firm.

Q. 40. That was a policy in what company?

A. Connecticut Mutual?

Q. 41. For how much?

A. Twenty thousand dollars; I don't know whether there was one policy or two, either.

Q. 42. Payable originally to whom?

A. Why, I don't know; I thought my wife.

Q. 43. Do you know now?

A. No; I'm not sure.

Q. 44. As a matter of fact, either by assignment or direct terms of the policy it was payable to the firm?

A. By the binder; yes.

Q. 45. That policy is with the insurance company?

Mr. Reinstein: There are two policies, Mr. Lazenby.

Mr. Lazenby: Yes; one on each.

Q. 46. These policies, Mr. Myers, which were payable to your wife, were assigned at what date?

A. There were some assigned January 2d.

Q. 47. What year?
A. 1917.
Q. 48. Had you consulted Mr. Reinstein at that time?
A. No, sir.
Q. 49. What was the reason of the assignment to your wife of those policies?

[Question objected to by Mr. Reinstein, and question withdrawn.]

Q. 50. How many policies were assigned to your wife?
68-28 Mr. Reinstein: Do you mean on that date? There were other policies assigned at other times.
Q. 51. On January 2d?
A. I don't know; might have been three or four; I don't know; whatever policies that I thought wasn't assigned that way.
Q. 52. When these assignments were made, Mr. Myers, had you received a statement of the condition of your company?

Mr. Reinstein: What do you mean,—did he "receive a statement of the condition" of his company?
Mr. Lazenby: Just what I say. Did he know the condition of his company. I am asking whether he had received from his bookkeeper, Mr. Glass, a statement setting out the condition of his company.
Witness: No, sir.

Q. 53. How often were financial reports of the condition of your company made?
A. Once a year.
Q. 54. And when were they made?
A. As near the first of January as possible.
Q. 55. How near the first of January?
A. It varies different years; during the month of January.
Q. 56. Do you have, in any form, a monthly trial balance?
A. Yes, sir.
Q. 57. What was the last trial balance that you had previous to January 1, 1917?
A. I would have to look at my records.

Mr. Lazenby: I shall have to ask that that trial balance and other trial balances be produced.
Mr. Reinstein: You will have to get that from the receivers. It's all in one book. The receivers have all the books.

Q. 58. Mr. Myers, with whom did you talk at the Trust Company when you obtained the various loans?
A. Glass, here, and Mr. Bancroft.
Q. 59. On every occasion?
A. On each occasion I was there; yes.
Q. 60. With whom did you talk when you gave this statement, referring to Exhibit 1?
A. If I remember right, that was mailed to them.
Q. 61. Was it mailed at their request?
A. It was mailed; yes, sir.

68-29 By Mr. Reinstein:

Q. 62. He asks you whether it was mailed at their request.
A. I don't know positive whether I mailed that or delivered it.

By Mr. Lazenby:

Q. 63. Did you at any time have any discussion with any officer at the Trust Company concerning that statement, Exhibit 1?
A. Not that I remember.
Q. 64. Whether or not you remember that the various items in this statement, Exhibit 1, were gone over by any officer of the Trust Company in your presence?
A. They were not, as far as I can remember.
Q. 65. Did you at any time explain any of the items on Exhibit 1?
A. Not that I remember.
Q. 66. In any of your talks with any officer of the Trust Company did you disclose the fact that any portion of your accounts had been assigned?
A. No, sir.
Q. 67. You knew, of course, of the assignment?
A. Yes.
Q. 68. That assignment had been in existence for how long?
A. We were doing business with that company about three years.
Q. 69. Three years from when; the last three years?
A. I think so.
Q. 70. So that at the date of this, January 1, 1916, you had been doing business with this Commercial Trust for two years?
A. Yes.
Q. 71. I show you a paper which purports to be a contract between Samuel A. Myers and Harry Myers and the Commercial Investment Trust, and ask whether your signature appears on that?
A. Yes, sir.
Q. 72. Is that the document assigning accounts to the Commercial Investment Trust?
A. That's a copy of it; yes, sir.

[Contract offered in evidence by Mr. Lazenby, and marked "Exhibit 2."]

Q. 73. Under the terms of this assignment, the Commercial Investment Trust agrees upon the assignment to it as collateral security of contracts, notes, accounts receivable and choses in action, arising from the sale of personal property hereinafter designated, to make advances. The assignor, the Myers, shall pay the Investment Trust interest at the rate of 6 per cent per annum upon every sum so advanced, and in addition a reasonable compensation for
68-30 labor,—services. The Commercial Investment Trust agrees to accept for such compensation and interest upon any account 1 per cent of the face amount of the account for the first fifteen days, 1 per cent for the second fifteen days, and one-thirtieth

of 1 per cent for each day thereafter; in other words, 1 per cent a month for the first month and one-thirtieth of 1 per cent per day thereafter. The face amount of any account shall mean the net amount after the deduction of any amount sufficient to cover charges, freight and other allowances, and upon making the assignment the Commercial Investment Trust advances to the Myers 80 per cent of the net face, less an amount, to be estimated, for reasonable compensation and interest. And upon receiving payment of each account, the Commercial Investment Trust shall reimburse itself for the amount advanced on the account and for the amount which may be due it for compensation and interest or any outlays or expenses. Then there is a provision permitting the Commercial Investment Trust to examine at its expense the books of S. A. & H. Myers, give them instruction concerning methods of bookkeeping and supply various forms. I do not think I need go any further on that. That shows the general nature of what it was. Under that contract, Mr. Myers, assuming that you had a thousand dollars worth of accounts which you assigned to the Commercial Investment Trust, how much net did S. A. & H. Myers get?

A. If the account was a thousand dollars net, S. A. & H. Myers finally got a thousand dollars net less their charges.

Q. 74. When the account was assigned to the Commercial Investment Trust how much of the thousand dollars did they pay over to S. A. & H. Myers?

A. Eighty per cent.

[Mr. Reinstein objects to this line of examination as being immaterial, and not being set forth in the specifications of objections to confirmation of composition. Objection is overruled, the parties to go before Judge Morton for a ruling.

[Mr. Reinstein saves exception.]

Mr. Gibbs: While this assignment is not specifically set forth in the objections, the evidence is admitted under the last clause of the paragraph referring to the statement.

68-31 Q. 75. Mr. Myers, can you give us the details of this Commercial Investment Trust account?

A. What details?

Q. 76. The details of the whole account,—the value of the accounts assigned and the amount of money which you received?

Mr. Reinstein: Do you mean during the entire period he was doing business with them?

Mr. Lazenby: On January 1, 1916.

Witness: I can't tell you the amount.

Q. 77. That appears on the books, doesn't it?

A. Yes.

Q. 78. You can't do it from your memory?

A. Why, certainly not.

Mr. Gibbs: What you want is a statement of the account at that date?

Mr. Lazenby: Yes. I don't believe I can go any farther with Mr. Myers. I want the books and the assignment of the insurance policies, and trial balance.

Mr. Reinstein: We can't get the assignment of the insurance policies, you understand.

Mr. Lazenby: I understand that; and I shall also want to examine Mr. Harry Myers.

Mr. Reinstein: Have you concluded with Mr. S. A. Myers?

Mr. Lazenby: Until these books and papers are produced; yes; but I shall certainly want to ask him some questions about the assignment of the policies, in all probability as soon as I can get them. Mr. Glass I shall want to examine on the books.

Mr. Reinstein: Are you prepared to examine Mr. Glass now?

Mr. Lazenby: No; at present I'm not.

[Adjourned to Tuesday, April 24th, 10 a. m.]

Boston, Mass., May 15, 1917—10 a. m.

HENRY L. JEWETT (sworn).

Direct examination:

By Mr. Lazenby:

Q. 1. You are connected with the International Trust Company, Mr. Jewett?

A. Yes.

Q. 2. In what capacity?

A. Vice-president and secretary.

Q. 3. And how long have you held the position of vice-
68-32 president and secretary?

A. Secretary for thirty-seven years and vice-president four years.

Q. 4. Did you have anything to do with the giving of credit to the S. A. & H. Myers?

A. I did.

Q. 5. Did you receive a statement from S. A. & H. Myers?

A. Yes.

Q. 6. I show you Exhibit 1, and ask you whether that is the statement?

A. [Witness examines statement.] Yes.

Q. 7. Did you pass on behalf of the International Trust Company on the line of credit to the S. A. & H. Myers?

A. Yes.

Q. 8. And when you passed on that line of credit upon what did you base the credit?

A. Their signed statement.

Q. 9. Which statement?

A. The financial statement you have just shown me.

Q. 10. Exhibit 1?

A. Yes.

Q. 11. Did the International Trust Company make loans to the S. A. & H. Myers after January 1, 1916?

A. Yes.

Q. 12. Give the dates and the amounts of those loans, if you will, please.

A. November 2, 1916, for two thousand; November 10 for two thousand; November 13 for two thousand; December 1st for two thousand; December 8 for two thousand; December 11 for two thousand; December 13 for two thousand; December 15 for two thousand; December 18 for two thousand; October 2d for two thousand.

Q. 13. Referring to Exhibit 1, were you ever informed that any portion of the accounts receivable as set forth in Exhibit 1 were assigned to any person or corporation?

A. I was not.

Q. 14. Were you ever informed of any assignment of accounts by the S. A. & H. Myers to the Commercial Investment Trust?

A. I was not.

Q. 15. Were you ever informed that the notes payable which appear on Exhibit 1 excluded a note to the Stoughton Trust Company?

A. I was not.

Mr. Reinstein: You mean the mortgage note, now?

Mr. Lazenby: The mortgage note.

Mr. Reinstein: You had better designate it.

68-33 Q. 16. Were you ever told or informed, Mr. Jewett, of a mortgage note on real estate and buildings on the Stoughton factory?

A. I was not.

Mr. Lazenby: That's all.

Cross-examination:

By S. O. Reinstein:

X Q. 17. Is it your part of the business of the International Trust Company to pass upon the loans that are made?

A. With the other officers.

X Q. 18. And were the other officers consulted in the making of these loans to Messrs. Myers?

A. They were not.

X Q. 19. This statement was delivered to you some time in March, 1916,—referring to Exhibit 1?

A. It was.

X Q. 20. These loans which you have recited were made from the following November on?

A. I guess the first one was dated October 2d.

X Q. 21. From October 2d on?

A. Yes.

X Q. 22. And did you inquire from either of the Myers at the

time they made the first loan in October whether their condition was the same as shown by their statement as of January 1st, 1916?

A. No; but I supposed the signed statement made it unnecessary.

X Q. 23. And you made no inquiry of them?

A. Certainly not; I had a signed statement.

X Q. 24. And did you make any inquiry at any time that the future loans were made?

A. I did not.

X Q. 25. How long had the Myers been doing business with your bank?

A. I can't tell you; a great many years; several years, at least.

X Q. 26. And during those several years they had borrowed money of the bank, from time to time?

A. Yes.

X Q. 27. Now, from October, at the time these different loans were made, subsequent to then, you never had any conversation with the Myers as to their financial standing?

A. No.

X Q. 28. Were you interviewed personally by Myers as to these loans from October on?

A. The notes were handed in; I couldn't say just who handed them in.

68-34 X Q. 29. You don't recall of any personal interview you had with the Myers since October?

A. No; I had none whatever.

X Q. 30. Did you ever have any personal interview with them?

A. I did not.

X Q. 31. And your only knowledge is the fact that the notes were passed in for discount and they were discounted?

A. Yes.

X Q. 32. No verbal statement was made by Myers to you?

A. No.

Mr. Reinstein: That's all.

Redirect examination.

By Mr. Lazenby:

Q. 33. Was it your duty, Mr. Jewett, to determine whether the credit should be given to the S. A. & H. Myers on these various notes?

A. I don't think I quite understand your question, Mr. Lazenby. I took the notes and passed on them.

Q. 34. When you say you "passed on them" what do you mean?

A. When the note was brought in I discounted it; put it to their credit.

Q. 35. You determined whether or not that note should be discounted?

A. Yes, I discounted all those notes but one.

Mr. Lazenby: That's all.

HARRY MYERS (sworn).

Direct examination.

By Mr. Lazenby:

Q. 1. What is your full name?
A. Harry Myers.
Q. 2. And what is your connection with S. A. & H. Myers?
A. Selling department.
Q. 3. As one of the partners?
A. Yes, sir.
Q. 4. And how long have you been a partner of the S. A. & H. Myers?

Mr. Reinstein: That's all been testified to, Mr. Lazenby.
Mr. Lazenby: Not in this examination.

A. Since the foundation of the concern.
Q. 5. About when was that?
A. About nine years ago.
Q. 6. Did you have anything to do with the financial end of the business?
A. None whatever.
68-35 Q. 7. Who did?
A. My brother.
Q. 8. And you left all financial matters to him?
A. I did.
Q. 9. And he was authorized by you to borrow such money as the firm needed?
A. He had charge of the finances.
Q. 10. And he was authorized, was he not, to borrow such money as the firm needed?
A. Well, I don't quite get your question. That question never came up between us. He was to attend to the finances.
Q. 11. And procure such money as the firm needed in carrying on its business?
A. I suppose so.
Q. 12. You knew, as a matter of fact, that he did?
A. I knew he was attending to the finances.
Q. 13. And you knew, as a matter of fact, that he did, from time to time, borrow money?
A. Yes, sir.
Q. 14. Did you know that he had borrowed money from the International Trust Company?
A. Yes, sir.
Q. 15. In fact, didn't you endorse those notes, from time to time?
A. Yes, sir; that is, in connection with him.
Q. 16. In connection with him, of course.
A. Yes.
Q. 17. Did you have anything to do with the preparation of this statement, Exhibit 1?
A. None whatever.

Q. 18. Did you know that statements, from time to time, were prepared and given to banks and other concerns?

A. I knew statements were given out.

Q. 19. And that the preparation of those statements was in the hands of your brother, was it not?

A. In the hands of my brother?

Q. 20. Yes.

A. Why, he had charge of that.

Q. 21. Such statements as he prepared and handed out were prepared with your consent and approval, were they not?

A. Well, I don't know as he ever asked my consent, but that was the understanding.

Q. 22. That he should prepare such statements as had to be given out?

A. Yes.

Q. 23. Now, you were examined, were you not, before Mr. Wrightington and Mr. Harris, as receivers?

A. Yes, sir.

Q. 24. You were asked, were you not, the following questions:

68-36 "Is there any insurance outstanding upon your life? Yes, sir. In what companies? Connecticut Mutual. What are the total amounts of the policies? Fifty thousand dollars. How many policies? I don't know how many policies I have. How long have you carried this insurance? Well, from the first, fourteen years ago, and then there have been intervals between that. And when was the last policy taken out? I think it has been running six or seven years. Are those policies pledged? Yes, sir. Are they now in the possession of the Connecticut Mutual? Yes, sir. To whom are the policies payable? My wife. Do you know whether you have a right to change the beneficiary in those policies? No, sir. What do you mean, that you do not know whether you do not have the right? I do not know."

Do you remember testifying to that effect? A. Yes, sir.

Q. 25. Did you know, Mr. Myers, that there was a mortgage on the Stoughton property?

A. A mortgage on the Stoughton property?

Q. 26. Yes.

A. Yes, sir.

Q. 27. In your bankruptcy schedules, Mr. Myers, did you include any policy of insurance upon your life which was payable to the firm?

A. No, sir.

Q. 28. There is such a policy, is there not?

Mr. Reinstein: There is an amendment filed to that, and the amendment shows that.

Mr. Lazenby: I am referring now to the original schedules, those filed on February 10, 1917.

Q. 29. You know that there is such a policy, do you not?

A. I do now; yes, sir.

[Mr. Lazenby offers photographic copies of policies and assignments as follows:
Policy and assignment 270,731 upon the life of Harry Myers, marked "Exhibit 3".
Policy and assignment 270,732, marked "Exhibit 4".
Policy and assignment 243,083, marked "Exhibit 5".
Policy and assignment 243,084, marked "Exhibit 6".
Policy and assignment 256,788, marked "Exhibit 7".
Policy and assignment 256,787, marked "Exhibit 8".]

68-37 Mr. Lazenby: I have merely the assignment of policy 288,511. That is an assignment of the policy to S. A. & H. Myers.

Mr. Reinstein: Is the twenty thousand dollar one?

Mr. Lazenby: Yes, I presume it is.

Mr. Reinstein: There are two of those policies, you know?

Mr. Lazenby: Yes; one on each of them.

[Assignment of policy 288,511, marked "Exhibit 9".]

Q. 30. Mr. Myers, when did you first know that the concern was in financial difficulties?

A. Some time in January.

Mr. Reinstein: What year?

Witness: 1917.

Q. 31. At what time in January?

A. The last of the month some time. I don't know the exact date.

Q. 32. And what first brought it to your attention?

A. A note that was due, and we didn't have funds to pay it, made me realize it,—a note for eleven thousand dollars.

Q. 33. Where was that note held?

A. Cosmopolitan Trust Company.

Q. 34. Had you at that time received a statement of the condition of your company for the year 1916?

A. Had I received a statement?

Q. 35. Yes?

A. I had not received any statement.

Q. 36. Had you seen such a statement at any time for the year 1916?

A. I saw it at the time around in January, 1916; not since then.

Q. 37. Wasn't a statement prepared as of January 1st, 1917, Mr. Myers?

A. Not that I saw.

Q. 38. We will leave it if any such was prepared you didn't see it?

A. Yes, sir.

Q. 39. Did you or did you not see it?

A. I did not see it.

Q. 40. When first did you consult Mr. Reinstein?

A. About that time of that note.

Q. 41. Before or after the note became due?

A. I couldn't say. My brother was home sick at the time.

Q. 42. Why did you assign these policies to your wife on
68-38 January 2, 1917, Mr. Myers?

A. Because I found out that they were not made out as intended.

Q. 43. What do you mean by that?

A. I was under the supposition that they were for the protection of my wife and children, and my brother informed me that they were made out wrong, and I immediately attended to having them made out right.

Q. 44. In other words, you discovered at that time that they were payable to your estate?

A. Yes, sir; my brother discovered it and informed me, and I immediately attended to mine.

Q. 45. Previous to January 1, 1917, Mr. Myers, had business been good for that current year?

A. I should say not.

Q. 46 You had been making drafts on your capital in the business, had you not?

A. Drafts on my capital?

Q. 47. Yes. You had drawn large sums out of the business, had you not?

A. Large sums?

Q. 48. Yes.

A. I wouldn't say so; no, sir.

Q. 49. You had drawn some sums from the business?

A. Yes, sir.

Q. 50. Now, can you give me the amounts of those withdrawals?

A. Not accurately.

Q. 51. Well, approximately?

A. I think about fifteen or sixteen hundred dollars over my salary.

Q. 52. And your salary was how much?

A. Four thousand a year.

Q. 53. So that during the year 1916 you drew approximately fifty-five hundred dollars from the capital of the business?

A. Approximately.

Q. 54. Now, in what form did it appear that business had not been good during the year 1916?

A. Why, the amount of sales didn't seem to be enough to cover expenses.

Q. 55. How did you know that the amount of sales were not enough to cover the expenses?

A. Simply judging from the years we had good business, and overheads were no larger.

Q. 56. Had you noticed that overhead expenses had increased?

A. Yes; naturally increased every year.

68-39 Q. 57. And your sales had decreased?

A. Sales decreased over normal; yes.

Q. 58. By how much had they decreased?

A. I couldn't say.

Q. 59. Can you give it in round figures?
A. Over normal years you mean?
Q. 60. Yes.
A. I should say one hundred to one hundred twenty-five th sand dollars.
Q. 61. Had there been any decrease in the stock which you c ried?
A. Why, at what time?
Q. 62. During that year, towards the latter part of the year?
A. I think it fluctuated.
Q. 63. Now, when did you first notice that sales were dropping o
A. The year before wasn't a satisfactory year.
Q. 64. Well, was 1916 more unsatisfactory than the year befo
A. Yes, sir.
Q. 65. And when did you notice in 1916 that the sales w dropping off?
A. Why, through the year the sales were unsatisfactory and ha
Q. 66. Is this a fair way to leave it, that during the year 1916 sales gradually dropped down?
A. From a normal year?
Q. 67. From a normal year.
A. Yes, sir.
Q. 68. Did you have any discussion with your brother as to rais capital during the year 1916?
A. None whatever.
Q. 69. Did you know that he had borrowed from October to end of December, 1916, $20,000 from the International Trust C pany?
A. I didn't know the dates; no, sir.
Q. 70. You knew he had borrowed, approximately, that sum, you not?
A. Approximately; yes, sir.
Q. 71. You had signed the notes?
A. Yes, sir; I endorsed them in connection with him.
Q. 72. Had you endorsed notes for other banks during that s period?
A. I don't think so.
Q. 73. What explanation did you get when you were asked endorse these various notes to the International Trust Company
A. No explanation whatever.
Q. 74. In other words, you were simply asked to end
68-40 them, and you endorsed them without asking any questi is that so?
A. I was away when most of them were made out, and endo them when I got home from the road; went down to the bank endorsed them. They were passed on before I endorsed them.
Q. 75. I don't know whether I asked you before, Mr. Myers, I will do so now. Did you see Exhibit 1, the statement, whe was prepared?
A. I think not.

Q. 76. You knew, did you not, Mr. Myers, the amount of insurance carried on your life?
A. Yes, sir.
Q. 77. And that was how much?
A. Fifty thousand.
Q. 78. And you knew how many policies you had assigned to your wife, did you not?
A. I was under the positive impression that I assigned all my policies to my wife.
Q. 79. You knew what policies you had assigned, did you not?
A. I thought I assigned all of them. I went up there and they had the slips all ready.
Q. 80. Went up where?
A. I went up to the company and they had the slips all ready for me, and I thought it included every policy I owned.
Q. 81. Didn't you know that you had not assigned a policy for $20,000?
A. I did not.
Q. 82. When first did you discover that you had not assigned it?
A. When Mr. Wrightington, or whoever inquired into the matter, informed me. I think it was Mr. Wrightington.
Q. 83. At the time you executed these assignments, did you not add up the amount of insurance which you were assigning?
A. From those slips?
Q. 84. Yes.
A. No, sir.
Q. 85. Didn't the insurance company have a folder containing a record of your policies?
A. All he presented to me were those slips.
Q. 86. Didn't the insurance company have a folder containing a record of these policies?
A. If they did, I didn't see it.
Q. 87. Who was present at the time you executed these assignments?
A. The head man up there.
Q. 88. Do you know his name?
A. No, sir.
68-41 Q. 89. Mr. Cabot?
A. No, sir; a clerk.
Q. 90. And who else?
A. That's all.
Q. 91. Just you and he?
A. Yes, sir; he had them all prepared ready for me.
Q. 92. When did you give him instructions to prepare them?
A. My brother—when he had his; I asked him to have mine all read when I went up there; I simply went up to sign.
Q. 93. So that the instruction was given by your brother?
A. By my request.
Q. 94. By your request?
A. Yes.

Q. 95. And that request was made to him after he had told you that these policies were payable to your estate?
A. Yes, sir.
Q. 96. Now, at that time was there any discussion between you and your brother as to what it meant by having a policy payable to your estate?
A. No, sir.
Q. 97. You knew at that time what it meant having a policy payable to your estate, did you not?
A. I did.
Q. 98. You were present, were you not, at the first creditors' meeting?
A. Yes, sir.
Q. 99. And you don't remember the date, do you?
A. No, sir.

Mr. Lazenby: Is there any obpection to my stating that it was January 29?
Mr. Reinstein: No.

Q. 100. That meeting was held January 29, 1917, at 2 o'clock. At whose suggestion did you go down to Mr. Reinstein's office?
A. Why, I went out to the house and informed my brother about this note, and he advised me immediately to see Mr. Reinstein.
Q. 101. And how long previous to this meeting on Monday, January 29th, did you do that?
A. Why, at the time that note matured.
Q. 102. Well, about how many days previous to January 29 was that?
A. I couldn't tell you.
Q. 103. Did you have more than one conference with Mr. Reinstein previous to the creditors' meeting?

[Question objected to by Mr. Reinstein as immaterial, and objection withdrawn.]

68-42 A. I couldn't tell exactly how many conferences I had.

Mr. Lazenby: That's all.

JOHN R. GLASS (sworn).

Direct examination.

By Mr. Lazenby:

Q. 1. What is your full name?
A. John R. Glass.
Q. 2. You are employed where?
A. S. A. & H. Myers.
Q. 3. How long have you been employed there?
A. Since April, 1914.
Q. 4. In what capacity?

A. As bookkeeper and credit man.

Q. 5. I show you Exhibit 1, and ask whether that outside of the stock was prepared by you?

A. Yes, sir.

Q. 6. Now, on January 1, 1916, the S. A. & H. Myers had made an assignment of certain accounts receivable to the Commercial Investment Trust, had it not?

A. Yes, sir.

Q. 7. How much in value were those accounts receivable so assigned?

A. The gross amount of the accounts assigned was $26,997.63.

Q. 8. Now, on March 27, 1916, accounts receivable had been assigned to the same Trust, had they not?

A. Yes, sir.

Q. 9. And how much were those?

A. The gross amount of accounts assigned was $46,441.13.

Q. 10. Now, in Exhibit 1, I ask whether it appears that any accounts receivable had been assigned?

A. It does not so state.

Q. 11. At whose instruction was this Exhibit 1 prepared?

A. At the instruction of Mr. S. A. Myers.

Q. 12. Now, referring again to Exhibit 1, I ask whether or not among the notes payable or accounts payable there is included an item of a mortgage note on the Stoughton property?

A. No, there is not.

Q. 13. Did the company carry on its books in any account any insurance policies on the lives of S. A. and H. Myers?

A. No, sir.

Q. 14. The company from time to time paid premiums, I understand, on those policies?

A. I paid premiums; yes.

Q. 15. Well, when you say "I paid premiums," you mean
68-43 that you, personally, paid them out of your own pocket?

A. I would send checks to be charged to the account of S. A. & H. Myers, and whoever the policy belonged to I would charge it directly to their personal account.

Q. 16. You sent checks of the S. A. & H. Myers?

A. Yes.

Q. 17. And you charged the amount of those checks to the personal account of whoever's policy the premium was paid on?

A. Yes.

Q. 18. Now, that personal account consisted of what?

A. Of money drawn during the year.

Q. 19. By either of the two partners?

A. Yes.

Q. 20. Whether in salary or in any other form?

A. Yes, sir.

Q. 21. Did your books contain any loan account on account of the insurance policies?

A. No, sir.

Q. 22. Did you have any conversation with either of the Mr. Myers in regard to the condition of the company?

A. No, sir.

Q. 23. After January 1, 1917, did you have any conversation with them?

A. Not until a day or two before the first creditors' meeting.

Q. 24. With whom did you have that conversation?

A. Mr. S. A. Myers.

Q. 25. And what was the cause of that conversation?

A. A protested note of eleven thousand five hundred dollars to the Commonwealth Trust.

Q. 26. Which you knew you could not pay; is that not so?

A. Well, I knew we hadn't bank funds to pay it.

Q. 27. You knew, did you not, that considerable sums of money had been borrowed from the International Trust Company from October through December, 1916?

A. Yes, sir.

Q. 28. Did you have any conversation with Mr. S. A. Myers in regard to that?

A. He just simply notified me to make out notes and take them down to the International Trust and have them discounted.

Q. 29. Beyond such notification, you had no conversation, as I understand it?

A. No, sir.

Mr. Lazenby: That's all, Mr. Glass.

68-44 Cross-examination.

By Mr. Nelson:

X Q. 30. You were asked, Mr. Glass, with reference to assigned accounts to this Commercial Investment Company. What was the system of bookkeeping? How did you keep those accounts? How did the accounts show in this statement and on your books?

A. When we assigned scheduled accounts we showed the amount of accounts assigned as the gross and an offset against that of the 80 per cent which we received from them.

X Q. 31. In other words, if I am correct about this, your accounts receivable showed the full amount of the account as it was?

A. Yes, sir.

X Q. 32. That is, worth one hundred cents on the dollar?

A. Yes, sir.

X Q. 33. And in your accounts payable you have included the amount of money you have borrowed from the company?

A. As a liability.

X Q. 34. See if I am correct. This statement as made up shows the account as accounts receivable?

A. Yes, sir.

X Q. 35. Now, when you borrowed from the Commercial Company,—whatever its name may be,—how does that appear?

A. As a liability.

X Q. 36. So that it is included in some form in this statement?
A. In the accounts payable.
X Q. 37. So that, as a matter of fact, the account is absolutely correct as far as that particular item is concerned?
A. Yes, sir.
X Q. 38. Some question was asked you with reference to a mortgage note, I think, referred to. My brother asked you whether the note was included in accounts payable. I think you answered that it was not. Was the equity included in any place?
A. No, sir.
X Q. 39. Then how did you carry that transaction?
A. It didn't appear on the books.
X Q. 40. Not in either credit or debit?
A. No.
X Q. 41. Does the equity, or any value of the equity, appear in this statement?

[Question objected to and objection sustained.]

68-45 X Q. 42. And the indebtedness does not appear on the mortgage note?
A. No, sir.
X Q. 43. Did you have anything to do with the purchase of the real estate in the first instance?
A. No, sir.
X Q. 44. Yo had no technical or expert knowledge of the value?
A. No, sir.

Mr. Nelson: I think that's all.

Redirect examination.

By Mr. Lazenby:

Q. 45. You did pay, did you not, from time to time, Mr. Glass, the interest on this Stoughton note?
A. Yes, sir.
Q. 46. And you had done for a considerable period of time, had you not?
A. Yes.
Q. 47. So that you knew all this time that there was an obligation due from the S. A. & H. Myers to the Stoughton Trust Company, did you not?
A. Yes.
Q. 48. You have had considerable experience as a bookkeeper, have you not?
A. Yes, sir.
Q. 49. About how many years?
A. Well, I should say twelve; ten or twelve.
Q. 50. And you know what it means, do you not, to assign accounts?
A. I do now; yes.

Q. 51. You did during the year 1916, did you not?

A. Well, yes, I had an idea what an assignment meant.

Q. 52. When did you make a change in your method of bookkeeping by which you excluded the accounts assigned to the Commercial Investment Trust from the accounts receivable?

A. Some time in the early part of 1916, I should say, at the request of the Commercial Investment Trust.

Q. 53. You did make such a change?

A. Yes, made a change.

Q. 54. And you also excluded from accounts payable the money which had been paid to the S. A. & H. Myers on account of these assignments?

A. Yes.

Q. 55. Now you knew, did you not, that this money which was paid by the Commercial Investment Trust was not to be repaid by the S. A. & H. Myers to the Commercial Investment Trust?

68-46 A. The Commercial Investment Trust could call for repayment any time.

Q. 56. Only upon accounts which had not been collected; is that not so?

A. Yes.

Q. 57. Did they ever, at any time, call for the repayment of any of sums of money which they had advanced to the S. A. & H. Myers?

A. If the account was past due; yes.

Q. 58. They had done it?

A. Yes.

Q. 59. Now, on the net amount of money which you received from the Commercial Investment Trust, how much did you pay for it.

[Question objected to as immaterial; question admitted by referee, and objection withdrawn.]

A. One-thirtieth of one per cent per day provided we got over one hundred thousand.

Q. 60. What was the last?

A. Provided our business with them amounted to over one hundred thousand a year.

Q. 61. And if your business was less than one hundred thousand a year?

A. Half of one per cent additional.

Q. 62. Now you say one-twelfth of one per cent——

A. One-thirtieth of one per cent.

Q. 63. One-thirtieth of one per cent a day. Was that on the gross amount of the accounts which were assigned, or on the amount of money which you received?

A. Of the face value of the schedule.

Q. 64. The gross amount?

A. Yes.

Q. 65. Had your company given any note to the Commercial Investment Trust?

A. None that I know of.

Mr. Lazenby: I think that's all.

Recross-examination.

By Mr. Nelson:

X Q. 66. Did the firm of Myers & Company pay any rent for the use of this property in Stoughton?
A. No, sir.
X Q. 67. Paid no rent for it?
A. Nothing designated as rent; no, sir.
X Q. 68. Was any rent paid in any form?
A. In the form of interest.
68-47 X Q. 69. I want to know if anything beyond interest and taxes was paid?
A. No, sir.
X Q. 70. Nothing else was paid?
A. No, sir.
X Q. 71. There was no charge of any kind?
A. No, sir.
Mr. Nelson: That's all.

SAMUEL A. MYERS (recalled).

Direct examination continued by Mr. Lazenby:

Q. 79. Mr. Myers, you signed and swore to these bankruptcy schedules, did you not?
A. If they are all signed like that, I did.
Q. 80. Well, I think you will find that each page is signed.
A. Well, I presume they must be right. It's my signature, of course.
Q. 81. They were prepared from information which you gave, I take it, to Mr. Reinstein, were they not?
A. Yes.
Q. 82. And in these schedules do you find any insurance policy upon your life among the assets?
A. There was only one shown that I signed, and that was lately.
Q. 83. In the original one?
A. There wasn't any.
Q. 84. You didn't include it?
A. No, sir.
Q. 85. Now, I show you page —, Schedule B, Real Estate, and ask whether or not you have set any value upon the real estate, factory, buildings, etc., at Stoughton?
A. Did I set a value?
Q. 86. Yes.
A. I never put any value on them; no, sir.
Q. 87. Will you look at that page and see whether a value has been put on?

A. Yes, I see there is.

Q. 88. And you have sworn to such a value?

A. It is what I paid for it; yes.

Q. 89. You have sworn that there was such a value there?

A. Yes.

Q. 90. When first did you know, Mr. Myers, that you were in financial difficulties?

A. The latter part of January. I was home sick and my brother Harry came out to see me and told me about being short of money,—didn't know how he could pay his bills.

Q. 91. Can you give about what part of January it was?

A. I will set the 25th, as near as I can tell.

68-48 Q. 92. January 25th?

A. About January 25th as near as I can remember.

Q. 93. But you wouldn't set that as the exact date, would you?

A. No; I couldn't say the day.

Q. 94. Now, I show you Exhibit 1, and ask why that statement was given to the International Trust Company?

A. They asked me for a statement, and I sent it to them.

Q. 95. Did you know what the statement was going to be used for?

A. Why, credit, I supposed. I had given them statements for many years.

Q. 96. You knew upon that statement they would determine whether they would advance money on your notes?

A. Why, I presume so.

[Mr. Lazenby offers photographic copies of policies and assignments as follows:

Policy and assignment No. 252,829, marked "Exhibit 10".
Policy and assignment No. 288,882, marked "Exhibit 11".
Policy and assignment No. 252,830, marked "Exhibit 12".
Policy and assignment No. 288,881, marked "Exhibit 13".
Assignment of policy No. 288,512, marked "Exhibit 14".]

Mr. Lazenby: Now, I have a statement here showing the various policies of insurance upon the lives of both the Myers, which shows, also, the amount of the loan from the insurance company and the cash surrender value at the various dates.

[Statement offered in evidence, and marked "Exhibit 15".]

Q. 97. When did you determine to make the assignment of these various policies to your wife, Mr. Myers?

A. Why, I can't tell exactly when.

Q. 98. Approximately?

A. Oh, I should say a day or two before I did.

Q. 99. And what induced you to do it?

A. Because I found out that they wasn't made out that way, and I supposed they were.

Q. 100. You found out that they were not made out to your wife; is that so?

A. Yes.

Q. 101. And you discovered that they were made out to your estate?

A. Yes,——that is, some of them.

68-49 Q. 102. How did you find that out?

A. I had occasion to go up to the Connecticut Mutual office, and I inquired.

Q. 103. As to how the policies were made out?

A. How certain policies were made out. I knew how some of them were made out.

Mr. Reinstein: I assume this refers to those policies assigned in January.

Mr. Lazenby: There were some assigned previous dates. That statement covers that. I am referring merely to the policies assigned in January, 1917.

Q. 104. Did you know at that time that the sales of your company had been dropping?

A. Why, I wouldn't say that I did. I knew business was poor at that particular time.

Q. 105. Well, you knew, did you not, that business had been poor during the whole year?

A. I did.

Q. 106. You knew, also, that you had considerable notes coming due in January, or notes for a considerable amount of money coming due in January, did you not?

A. I don't think I did, except one note.

Q. 107. Did you have a note account on your books?

A. Yes.

Q. 108. And didn't you refer to that, from time to time?

A. A few days in advance.

Q. 109. And hadn't you referred to that note account a short time previous to when you went into the Connecticut Mutual office?

A. No.

Q. 110. Had you had any discussion with Mr. Glass in regard to notes coming due at that time?

A. In January?

Q. 111. I believe you said you went down to the Connecticut Mutual a few days before these assignments?

A. Yes. As far as I can remember, I didn't have anything to say to Mr. Glass about notes at that time.

Q. 112. Had you had any conversation with him in regard to obligations of the company at about that time?

A. No, sir.

Q. 113. Or the financial condition?

A. No, sir.

Q. 114. You had received your trial balance for the month of November, had you not?

A. Trial balance?

Q. 115. Yes.

A. For the month of November I didn't see it.

68-50 Q. 116. Didn't you see that trial balance?

A. No, sir; I didn't look at it.

Q. 117. Did you have any discussion with Mr. Glass about it?

A. No, sir.

Q. 118. When was the last trial balance that you did see?

A. I can't tell you; I wasn't interested.

Q. 119. Why do you say that?

A. Because I wasn't interested in that month's trial balance, it was so near inventory.

Q. 120. Had you seen the previous month's?

A. Previous month's—there were some during the year I had seen.

Q. 121. You had seen some during the year?

A. Yes.

Q. 122. But can you tell how soon before January 1, 1917, you had seen one?

A. I can't, Mr. Lazenby.

Q. 123. Can you give any approximate time?

A. No.

Q. 124. Well, was it three or six months?

A. It might have been; no, I can't tell you with any accuracy at all.

Q. 125. Referring to Exhibit 1, did you have any conversation with Mr. Glass about the details of that exhibit?

A. No, sir, except when I got requests to send the International one I told him to draw one up and I would sign it.

Q. 126. Now, when you did assign these policies in January, did you see any file or card of the Connecticut Mutual relating to your policies?

A. No, sir.

Q. 127. Who did you see there?

A. I saw Mr. Cranston.

Q. 128. Anybody else?

A. At that time?

Q. 129. Yes.

A. I think it was Mr. Cranston.

Q. 130. Anybody else?

A. I have seen other people up there,—spoke to them.

Q. 131. And did you ask Mr. Cranston about your brother's policies?

A. When I found——

Q. 132. Well, did you ask him?

A. Yes.

Q. 133. And did he send out for a card or something of that nature?

A. I don't know what he sent out for. He got me the information.

Q. 134. Mr. Cranston is manager?

A. I think that's his title.

68-51 Q. 135. Well, he is head of that office?

A. He is the head of that office.

Q. 136. You knew at that time, did you not, that you had insurance of $50,000?

A. Yes, sir.

Q. 137. And you knew the amount of insurance that you had assigned to your wife, did you not?

A. No, sir.

Q. 138. You knew at that time how many policies you had assigned?

A. No; I didn't know how many policies I had.

Q. 139. Did you make any computation, Mr. Myers, as to the amount of insurance which you assigned on January 2, 1917?

A. No.

Mr. Lazenby: I think that's all.

Cross-examination by Mr. Nelson:

X Q. 140. Mr. Myers, what did you pay for the real estate in Stoughton?

A. Four thousand dollars.

X Q. 141. And the mortgage?

A. Three thousand.

X Q. 142. So that there was an equity of?

A. One thousand dollars.

X Q. 143. And was that carried any place on your books?

A. No; it was charged right off.

X Q. 144. Did the concern pay any rent?

A. No.

X Q. 145. Who paid the taxes and interest?

A. The firm paid the taxes and interest.

X Q. 146. Was there any reason why you did not carry the equity on your books?

A. The only reason, we didn't think that there was any value there to speak of. It was such a small proposition that we didn't value it anything; just bought it. We would have to hire a place if we didn't just come across it at that time.

X Q. 147. What did you use the building for?

A. Manufacturing rain coats.

X Q. 148. Was that statement, Exhibit 1, a true statement?

A. Yes, sir.

Mr. Nelson: I think that's all.

Mr. Lazenby: There's nothing more.

By Mr. Nelson:

X Q. 149. Mr. Myers, were there any unusual conditions during the year 1916 in your particular line?

A. Yes.

68-52 X Q. 150. What were they?

A. Very hard market, big advances and strikes, and things of that sort.

X Q. 151. You mention strikes. Did you have any strikes on your hands during the year 1916?

A. It wasn't a strike; no. We gave in and paid advances to workers,—threatened strikes.

X Q. 152. Did that settle all unsatisfactory conditions?

A. The time is just up about this time. The clothing trade is now making new arrangements with them. They made a contract the last time.

Redirect examination by Mr. Lazenby:

Q. 153. During that year the general clothing business had been very unsettled, had it not?

A. I couldn't answer that, Mr. Lazenby.

Q. 154. I thought you just said so.

A. I am talking about my own business.

Q. 155. Your own business had been unsettled during the previous year?

A. Yes.

Mr. Lazenby: That's all.

[Adjourned.]

EXHIBITS.

EXHIBIT 1, L. M. B.

[Electro here.] S. A. & H. Myers, Managers, [Electro here.]

36 Otis Street, 3 Winthrop Square, Boston, Mass.

Raincoats. Shops at Stoughton, Mass.

America's Leading Designer of Young Men's and Boys' Clothing.

Mar. 27, 1916.

International Trust Co., Boston, Mass.

Gentlemen: The following is a copy of our Financial statement, taken from Inventory January 1st 1916:

Mdse. in Stock & in process of manufacture		147,289.53
Cash on hand & in Bank		4,777.62
Accounts Receivable		58,425.06
Mchy. & Fixtures		8,833.96
		219,326.17
68-53 Accounts payable		76,102.72
Notes payable		59,713.12
Net Capital		83,510.33
		219,326.17

Yours very truly,

S. A. & H. MYERS.
S. A. MYERS.

EXHIBIT 2, L. M. B.

Contract between Samuel A. Myers and Harry Myers, doing business under the firm name and style of S. A. & H. Myers doing business in the City of Boston State of Mass. party of the first part, and Commercial Investment Trust, being the designation of the Trustees under a Declaration of Trust made and delivered March 29, 1915, at Boston, Mass., and deposited with the Old Colony Trust Company of Boston, second party.

First. The second party agrees to make advances to first party upon the assignment to it, as collateral security therefor, of contracts, notes, accounts receivable and choses in action, arising from the sale of personal property dealt in by first party, hereinafter designated as accounts, which are acceptable to and approved by second party. First party shall pay second party interest at the rate of six per cent (6%) per annum upon every sum so advanced, and in addition thereto, a reasonable compensation for the labor, services and various matters and things obligatory upon said second party under this contract, which compensation shall, at the instance of either party hereto, be submitted for determination to a court of competent jurisdiction holding its sessions at the City and in the State where this contract is accepted, but second party agrees to accept as and for such compensation and interest upon any account assigned one per cent of the face amount of the account for the first 15 days or portion thereof, one per cent of the face amount of the account for the second 15 days or portion thereof, and one thirtieth of one per cent of the face amount of the account for each day thereafter during the time such account is held as collateral, provided that first party agrees to the same as reasonable on any accounting between the parties for the proceeds of the account prior to recourse to any court. "Face amount" of any account as used in this contract shall mean the net amount thereof after the deduction of amounts deemed sufficient to cover discounts, freight and other allowances and credits to debtors and any other deductions which may be agreed upon at the time advances are made. And advances shall be made as follows:

68-54

Upon the making of any such assignment second party shall advance to first party 80% of the net face amount of each account assigned, less an amount to be estimated at the time of such assignment (but not to be then finally determined) for the reasonable compensation and interest hereinbefore provided for. And upon receiving payment of each account second party shall out of the proceeds reimburse itself for the amount advanced upon the account and for the amount which may be due it for compensation and interest and for any outlays for or with respect to the account (provided that if no amount shall have been so fixed by agreement, then said estimated amount thereof shall be temporarily deducted therefor), and shall pay first party the remainder of said

proceeds, provided, however, that second party shall have a lien upon any such remainder for all amounts whatsoever due to it from first party while said remainder remains unpaid, and may deduct such amounts from any such remainder. The second party shall not demand repayment of any advance prior to the maturity of the account or acounts upon which the advance is made; provided, however, that if first party shall violate any of the provisions hereof or become insolvent within the meaning hereof, or discontinue the active operation of its business as a going concern, then second party may at its election demand immediate payment of the advances made by it and of all amounts owing to it under this contract.

Second. The second party shall (*a*) at its own expense, at least, every sixty days, send one of its auditors to the place of business of first party who shall examine the books and records of first party relating to the accounts assigned to the second party and deliver a copy of his report or summary to the first party upon written request; (*b*) instruct first party concerning the method of
68-55 keeping their books, records and accounts; (*c*) supply first party forms required by first party for the execution of assignments of accounts to second party; (*d*) give the right to first party to submit any of its contracts of sale to the General Counsel of second party for advice and opinion as — the legality thereof; (*e*) do any and all things required of it by any bond given to it, by or for first party under or for any of the purposes of this contract and accepted by second party, it being agreed that any such bond shall be considered a part of this contract; (*f*) through its collection department endeavor to collect accounts of first party which first party may deliver to second party for collection; (*g*) through its credit department give information and opinions regarding credits which first party may submit to such department for advice; (*h*) pay all compensation, if any, to which H. Ittleson and C. L. Hemphill, or either of them or their substitutes, may be entitled for anything done under paragraph Eight hereof and shall be responsible for their acts under said paragraph.

Third. All accounts assigned by first party to second party shall be duly transferred to second party in form and manner satisfactory to it. Such transfers shall be made at New York, N. Y., or Boston, Mass., and be governed by the law of the State where made. And said first party hereby warrants to said second party with respect to every account which it may assign to second party (1) that the account is a valid account for its face amount and that it arose from the sale by first party in the ordinary course of business of personal property dealt in by first party; (2) that the account is not subject to any setoff, counter-claim, contra-account or reclamation whatsoever, or to any discount or deduction not mentioned in the assignment thereof, or the documents accompanying the same, and that the payment thereof is not contingent upon the fulfillment of any contract or upon any condition whatsoever; (3) that the assignment of the account to second party correctly states or shows the date of the maturity of the account; (4) that all the

merchandise, from the sale of which the account arose, has been or will be accepted by the debtor without objection thereto; (5) that the debtor is solvent and will remain so until his account is
68-56 paid and that he will pay the same in full at or before its maturity; (6) that they will not assign any accounts to any person other than second party while this contract remains in force without first giving one day's written notice to second party; (7) that in the event second party incurs any expense, whether for attorney's fees or otherwise, in or for the collection of any account assigned to it, or in or for the enforcement or defense of any of its rights under this contract, or of any guaranty thereof or otherwise growing out of or connected with the subject matter of this contract and accounts assigned thereunder, then said first party shall pay to second party the amount of every such expense. Upon breach of any of the foregoing warranties with respect to any account, the first party shall, upon demand, pay to second party the amount advanced upon such account, together with all amounts to which second party may be entitled with respect to such account, or shall substitute for said account other collateral acceptable to second party. Upon such payment or substitution the account so in default shall be surrendered to first party. But while second party holds any account, it shall have the right in its discretion, to make any composition or compromise of, or to adjust any claim concerning the account and to extend the time of its payment.

Any one by or against whom a petition in bankruptcy is filed, or who makes an assignment for the benefit of creditors, or for whom or for whose business a receiver is appointed, or who asks for an extension from his creditors, or who openly acknowledges his inability to pay his debts in full, or who has a suspension of business, or who does any act amounting to a business failure, shall be deemed insolvent for all the purposes of this contract.

Fourth. First party is hereby given the privilege at its own expense to make for said second party collections of accounts assigned to second party, but said privilege may be terminated by second party at any time. First party shall transmit and deliver to second party at its office in New York, N. Y., on the day of receipt thereof, every original check, draft, note and other medium of payment received in payment of or on account of any account assigned to second party.

68-57 With respect to every account assigned said second party shall have all rights of stoppage in transit. And if such right of stoppage in transit shall be exercised, or if any debtor owing any account assigned shall refuse or fail to accept or retain or shall return any of the merchandise out of the sale of which the account arose, or should any such merchandise be re-routed or re-consigned, then said second party shall be entitled to all merchandise so stopped in transit, and also to all merchandise so refused, or not accepted or retained, or returned, re-routed or re-consigned, to be by it held as collateral security, with the right to sell or otherwise dispose thereof and the title to any new account created through

the re-sale thereof shall also be and remain in said second party as collateral security.

Should any such merchandise come into the possession of first party, said first party shall at once notify second party thereof, and shall keep the same separate from all other merchandise for second party. Said second party may sell any such merchandise, either at public or private sale, with or without notice to first party, and apply the net proceeds thereof, after first paying all proper expenses towards the satisfaction of its claims against first party.

Fifth. First party agrees to execute and deliver to second party on demand, any instrument necessary or proper to carry into effect the terms, provisions and conditions of this agreement.

Immediately upon the consummation of the assignment to second party of accounts, first party agrees to make upon its books, suitable and proper entries disclosing the advance by and the assignment of said accounts to second party. Second party is hereby irrevocably given the right to inspect and audit the books, accounts, records, correspondence and papers of first party in relation to the accounts assigned it and advances thereon, at any time it may see fit to do so. Presentation and demand for payment, protest and notice of protest and of non-payment of any and all notes or other evidences of indebtedness assigned to second party, and notice of the breach of any guaranty or warranty hereby made by first party, are hereby expressly waived by first party.

Sixth. Assignments of accounts and other papers transmitted by first party by mail or express to second party at said City
68-58 of New York, N. Y., shall be deemed to have been delivered to second party at said City; and payments and papers by second party transmitted to first party by mail, express or telegram, from said City shall be deemed to have been made or delivered at said City by second party.

Seventh. First party agrees to procure the execution and delivery to second party of a fidelity bond to secure to second part the assignment of valid accounts and the transmission to second party of every original check, draft, note and other medium of payment received by first party in payment of or upon accounts assigned to second party.

Eighth. First party hereby irrevocably empowers and appoints H. Ittleson and C. L. Hemphill, and each of them, and any other person whom either or both may designate, to sign and endorse the name of first party upon every note, check, draft, money order, and every other medium of payment that may come into the possession of second party in payment of or upon accounts assigned to it by first party and upon any freight or express bill or bill of lading relating to any such account, verification statement, assignment of account and notice thereof to the debtor.

Ninth. This agreement and all its provisions shall inure to and bind the heirs, representatives, successors and assigns of the parties hereto, but shall not be binding upon the parties hereto until the same is accepted and executed by the second party, or one or more of the officers or agents of the Trust Estate, at its office in New York,

N. Y., or Boston, Mass., and shall be construed as a Massachusetts contract.

Tenth. This contract is accepted by or on behalf of the Trustees under the Declaration of Trust aforesaid, not individually but as such Trustees to bind the Trust Estate.

In Witness Whereof, the party of the first part hereto has executed these presents at Boston, Mass., this 22nd day of July, 1915. S. A. & H. Myers. [Seal.] S. A. Myers. [Seal.] Attest: ——, Secretary.

68-59 and the second party has executed these presents at the City of New York, N. Y., this 23d day of July, 1915. Commercial Investment Trust, by Henry Ittleson, President. Attest: C. L. Hemphill Secretary.

(The following Guaranty and Waiver is to be signed by individuals:

For and in consideration of the execution by Commercial Investment Trust of the foregoing contract at our request hereby made, the undersigned jointly and severally hereby guarantee to Commercial Investment Trust, its successors in trust and assigns, the full, prompt and faithful payment, performance and discharge by ——, hereinbefore termed "First Party", of each of the agreements, guaranties, warranties, provisions and conditions set forth in the foregoing contract or in any rider now or hereafter thereto attached or in any other written instrument executed by said first party to carry out the provisions of said contract.

The undersigned hereby waive notice of acceptance of this guaranty by Commercial Investment Trust, also notice of any breach of any of said agreements, guaranties, warranties and conditions and of any default on the part of said first party or on the part of any debtor owing any account coming within the provisions of said contract.

In Witness Whereof, we, and each of us, have hereunto set our hand- and seal- this — day of ——, 191-, at ——. —— ——. Witness: —— ——.

By this rider attached to contract dated the 22d day of July A. D. 1915, between S. A. & H. Myers and Commercial Investment Trust, and made part of said contract, it is agreed that the printed matter beginning with the sixth word "one" in line fifteen and ending with the ninth word "collateral" in line eighteen, be stricken out and in lieu thereof the following inserted, to wit:

"one-half per cent of the face amount of the first $100,000.00 of accounts assigned during twelve months succeeding the date
68-60 hereof and during each twelve months' period beginning with each anniversary of the date hereof, and also one-thirtieth of one per cent of the face amount of all accounts for each day such accounts are held as collateral."

And that the following shall be inserted in said contract in line thirty-nine thereof immediately after the fifth word "shall."

"(*a*-1) Pay all charges for exchange on checks received in payment of assigned contracts."

The other terms and conditions of said contract to which this rider is attached, shall remain in full force and effect. S. A. & H. Myers, by S. A. Myers. Commercial Investment Trust, by Henry Ittleson President.

68-61 **CITATION ON APPEAL.**

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Samuel A. Myers, of Boston, and Harry Myers, of Brookline, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the seventh day of July next, pursuant to an appeal duly obtained from a decree of the District Court of the United States for the District of Massachusetts, wherein International Trust Company, is appellant, and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James M. Morton, Jr., Judge of the District Court of the United States for the District of Massachusetts, this seventh day of June, in the year of our Lord one thousand nine hundred and seventeen. James M. Morton, Jr., United States District Judge.

ACKNOWLEDGMENT OF SERVICE ON CITATION.

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Boston, June 11, 1917.

Due and sufficient service of the within citation is hereby accepted by the within-named appellees. By their Attorney, Samuel O. Reinstein.

68-62 **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA,
District of Massachusetts, ss:

I, Frank H. Mason, Deputy Clerk of the District Court of the United States for the District of Massachusetts, certify that the foregoing are true copies of the papers agreed upon between the parties as the record on appeal from the order of the District Court confirming the composition in the matter of Samuel A. Myers et al., alleged bankrupts, No. 24,571, and also the original Citation, issued upon the

appeal of the International Trust Company, a creditor, with the Acceptance of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said court, at Boston, in said district, this twentieth day of June, A. D. 1917. [Seal.] Frank H. Mason, Deputy Clerk.

69 & 70 [Title omitted.]

STIPULATION.

[Filed Nov. 1, 1922.]

In the above entitled case it is stipulated that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari may be taken as a return to the Writ of Certiorari. John R. Lazenby, Attorneys for Plaintiff. Dunbar, Nutter & McClennen, Edward F. McClennen, Attorneys for Defendants.

Dated this 31st day of October, 1922.

71 [Endorsement omitted.]

72 **WRIT OF CERTIORARI.**

[Filed Nov. 22, 1922.]

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Superior Court, County of Suffolk, Commonwealth of Massachusetts, Greeting:

Being informed that there is now pending before you a suit in which Internationad Trust Company is plaintiff, and Samuel A. Myers and Harry Myers, Co-partners as S. A. & H. Myers, are defendants, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Superior Court and removed into the Supreme Court
73 of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-sixth day of October, in the year of our Lord one thousand nine hundred and twenty-two. Wm. R. Stansbury, Clerk of the Supreme Court of the United States.

74 COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Superior Court.

And now, here, the Justices of the Superior Court for the Commonwealth of Massachusetts, holden at Boston, within and for said County of Suffolk, make return of this writ in a suit of record in said Court for said County wherein International Trust Company is plaintiff and Samuel A. Myers and Harry Myers, carrying on business as a partnership in the name of S. A. and H. Myers, are defendants, by annexing hereto and sending herewith, under the seal of the said Superior Court, a stipulation of the parties to said proceedings, by which it is provided "that the Record heretofore filed in the Supreme Court of the United States in support of the Petition for Certiorari (No. 512 of October Term, 1922) may be taken as a return to the Writ of Certiorari" (dated the twenty-six day of October, A. D. 1922.)

In testimony whereof I, Francis A. Campbell, Clerk of said Superior Court, have hereto set my hand and the seal of said Court, this sixteenth day of November, A. D. 1922. [Seal of the Superior Court.] Francis A. Campbell, Clerk.

[Endorsement omitted.]

75 & 76 [Endorsement omitted.]

Supreme Court of the United States

OCTOBER TERM, 1922

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,

v.

INTERNATIONAL TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI
(TO THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK AND COMMONWEALTH OF MASSACHUSETTS)

EDWARD F. McCLENNEN,
For the Petitioners.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1922.

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,

v.

INTERNATIONAL TRUST COMPANY.

PETITION FOR WRIT OF CERTIORARI
(To the Superior Court for the County of Suffolk and Commonwealth of Massachusetts.)

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners Samuel A. Myers and Harry Myers as co-partners under the name of S. A. and H. Myers of Boston in the County of Suffolk and Commonwealth of Massachusetts, respectfully petition this Court for a Writ of Certiorari to require that there be certified to this Court for review and determination the cause the record of which remains in the Superior Court for the County of Suffolk in the Commonwealth of Massachusetts, numbered 104991, wherein your petitioners were the defendants, and the respondent the International Trust Company — a corporation organized under the laws of the Commonwealth of Massachusetts and having a usual place of business in said Boston, was the plaintiff; and wherein final judgment has been entered against your petitioners pursuant to a decision of the Supreme Judicial Court for the said Commonwealth rendered in June, 1922.

This action was begun in the Massachusetts Superior Court by the International Trust Company against the petitioners

to recover a balance of loans obtained by the petitioners, — it was alleged, — by false representations. The petitioners had theretofore been discharged in bankruptcy on the confirmation of an offer in composition. The plaintiff claimed that this discharge was not a bar because the loans were obtained upon a false statement in writing made by the petitioners to the plaintiff. The action was tried before a jury on the issue of falsity of the statement, and the jury returned a verdict for the plaintiff for $14,304.49.

At the trial, the petitioners offered in evidence a bankruptcy record. It was excluded but was made by reference a part of the bill of exceptions, subsequently allowed. From the bankruptcy record the following facts appear.

In January, 1917, an involuntary petition in bankruptcy was filed against the petitioners. They made an offer of 40 per cent in composition. This offer was referred to the Referee in Bankruptcy. A majority of the creditors accepted the offer. The Referee recommended its confirmation. Thereupon, on March 23, 1917, the petitioners filed an application for confirmation of the composition. The plaintiff International Trust Company, by its Counsel, John R. Lazenby, counsel in the case at bar, entered an appearance in opposition to confirmation and assigned as a specification of objection that the petitioners had obtained loans from the plaintiff "by the statement made in writing to the International Trust Company, that on the first day of January, 1916, the accounts receivable amounted to $58,425.06; that the alleged bankrupts in said statement set out that they owed notes payable amounting to $59,713.12; that the alleged bankrupts did not include in said item of notes payable a note of $3,000, secured by a mortgage of certain real estate, and said statement was materially false and was made for the purpose of obtaining the aforesaid sums on credit." "Said falsity being that the alleged bankrupts concealed and omitted to set forth in said statement the fact that of the said accounts receivable a certain portion in the neighborhood of $20,000, the exact sum being unknown to your petitioners, had been assigned and set over to the Commercial Investment Trust, and further, that

the accounts receivable as set forth in said statement do not amount to the said sum of $58,425.06."

These objections were referred to the Referee. He heard the petitioners and the plaintiff International Trust Company. He found and reported that the petitioners had made the financial statement of March 27, 1916, and that the International Trust Company relied on it in making the loans, but that when the financial statement was made it was a true statement and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time and kept by an experienced, competent bookkeeper, and that —

> "I do not find any evidence that the bankrupts or either of them falsely or purposely concealed or omitted to set forth in said statement the amount of the accounts assigned to the Commercial Investment Trust. I therefore find and so report, that according to the method of bookkeeping employed by the alleged bankrupts, the amount of the accounts receivable, January 1, 1916, was correctly set forth in said statement. I therefore find, and so report, that this objection is not sustained."

The Referee reported the testimony, and this testimony was substantially the same testimony which was introduced at the trial, in the Superior Court, of the case now at bar.

The case was heard in the Bankruptcy Court by the District Judge after the return of the report of the Referee. The District Judge confirmed (245 Fed. 110) the finding of the Referee, that the petitioners did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit, and decided that it was not the duty of the defendants to state the fact of the assignment, but that the creditor, if it considered the point material, ought to have inquired about it and that the statement ought not to be extended by implication to include recitals which it did not contain and which were never made by the alleged bankrupts, the petitioners.

Accordingly, on May 28, 1917, the District Court confirmed the composition.

The International Trust Company appealed to the Circuit Court of Appeals for the First Circuit. That court accepted the reasoning and conclusions of the District Judge and affirmed the order confirming the composition (245 Fed. 110, 112). A judgment was entered accordingly, with a mandate to the District Court. This judgment was "that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge."

The petitioners, in offering this record and in excepting to its exclusion, contended that the effect of this record as an estoppel was to be determined by the laws of the United States. At the close of the evidence in the Superior Court the petitioners also requested and the court refused, subject to the petitioners' exceptions, these requests for instructions, namely:

> "10. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendant's offer in composition establishes conclusively for the purposes of the present case that the statement was not false."
>
> "11. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendants' offer in composition establishes conclusively for the purposes of the present case that the statement was not made with an intention to deceive."
>
> "8. The mere failure to state that the accounts had been assigned as collateral security to the Commercial Investment Trust would not make the statement false."
>
> "12. The discharge of the defendants by the confirmation of the composition is a bar to this action."

The evidence at the trial in the Superior Court, like the evidence at the trial in the Bankruptcy Court, showed the following facts:

The petitioners were a partnership engaged in the manufacture of clothing. They dealt with the plaintiff as a bank of deposit and also borrowed money from it.

On March 27, 1916, in response to a letter from the plaintiff, the petitioners sent a statement of their financial condition, January 1, 1916, prepared by the petitioners' bookkeeper and in accordance with the petitioners' books.

In the preceding July the petitioners had entered into a contract with the Commercial Investment Trust, under which this Trust agreed "to make advances to first party upon the assignment to it as collateral security therefor" of the petitioners' accounts receivable.

In the financial statement of January 1, 1916, the item of accounts receivable was the amount of accounts receivable which the petitioners then actually had. No deduction was made from that amount for those accounts which had been assigned as collateral security under this contract with the Commercial Investment Trust. On the other hand, the accounts payable, as shown on the statement, included an amount equal to all accounts which had been so assigned for the advances which this Trust had made to the petitioners.

Accordingly, the net capital was not overstated.

The petitioners, under the arrangement with the Commercial Investment Trust, continued to hold and to collect these collateral accounts, remitting the proceeds to the lender in reduction of the loans.

The petitioners did not have any conversations with the plaintiff's officers or say anything beyond what appeared in the financial statement itself.

The petitioners testified that they had no intention to deceive the plaintiff.

The petitioners testified that on receiving the request for a statement they turned it over to the bookkeeper and asked him to get out a statement and gave no directions to him, and that they believed that the statement as they signed it was true.

Glass, the bookkeeper, called as a witness by the plaintiff, testified on cross-examination that he believed that the statement was true and that he had no intention to deceive.

The contract with the Commercial Investment Trust contained provisions for the payment of interest at rates determined by the amount of accounts assigned during the course of a year. As the amount so assigned exceeded $100,000, the interest actually paid was one-thirtieth (1–30) of one per cent (1%) a day on daily balances, — that is, 12 per cent a year.

All loans made by the plaintiff to the petitioners during the six months following the receipt of the financial statement were repaid. The first loan still remaining in part unpaid was made October 2, 1916.

The plaintiff claims that the statement was false because it did not call attention to the contract with the Commercial Investment Trust and to the terms of this contract, and to the fact that some of the accounts receivable were held by this Trust as collateral for advances. It was this claim of the plaintiff that the petitioners contended had been conclusively determined against the plaintiff by the decision of the District Court of the United States and by the decision of the Circuit Court of Appeals.

The petitioners took the case to the Supreme Judicial Court of Massachusetts by bill of exceptions which duly presented the petitioners' contention, that the estoppel by judgment was to be determined by the laws of the United States, that the exclusion of the record of the United States Courts was erroneous, that the mere failure to state that the accounts had been assigned as collateral security would not make the statement false, that the finding of the United States Court established conclusively that the statement was not false, and that it was not made with an intention to deceive, and that the discharge was a bar.

The Supreme Judicial Court overruled your petitioners' exceptions and sent down its rescript of such action to the Superior Court, and pursuant thereto final judgment was entered on the verdict for the plaintiff in June, 1922.

The decision of the Supreme Judicial Court is against the petitioners' claim (1) that the statement was not false within the meaning of that term as used in Section 17, Clause 2 of the Bankruptcy Act; and (2) that the decision of the District Court of the United States and the decision of the Circuit Court of Appeals were to be given effect to establish conclusively that the statement was not false and was not made with an intention to deceive; and (3) that the discharge in bankruptcy was a bar.

The reasons relied on by your petitioners for the issuance of a writ of certiorari, and upon which your petitioners believe that this petition ought to be granted, are:

(1) That in said action the petitioners claimed a right, privilege and immunity under the constitution and statutes of the United States, namely, that the Circuit Court of Appeals of the United States for the First Circuit, affirming a decree of the District Court of the United States for the District of Massachusetts, had decided conclusively in a suit between the same parties that the representations made by the petitioners were not false and the petitioners were entitled under the constitution, statutes and laws of the United States to have full effect given this decision in the suit at bar as establishing that fact; whereby, by a discharge in bankruptcy granted these petitioners on the confirmation of an offer in composition in said District Court, the petitioners had a complete defense and the decision of said Superior Court, affirmed on exceptions by said Supreme Judicial Court, was against the said right, privilege and immunity; and

(2) That said decision is in conflict with the decisions of this Supreme Court of the United States on the same question, and also it involves a question of general public importance, namely, the rights of persons discharged on confirmation of composition under the Bankruptcy Act of the United States after the Courts of the United States have rendered judgments in their favor on questions of fact and of law essential to the granting of the discharge; and the judgment of the Massachusetts Court, tends to bring into contempt for inefficacy the judgments rendered (on the same issue between the same parties) of the Courts of the United States.

Your petitioners present herewith a certified copy of the entire record in the said cause, including the opinion of the Supreme Judicial Court for the Commonwealth of Massachusetts and the record referred to therein of the District Court of the United States and of the United States Circuit Court of Appeals.

WHEREFORE your petitioners respectfully pray that a Writ of Certiorari be issued to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said decision of the Supreme Judicial Court of the Commonwealth of Massachusetts and the judgment of the Superior Court for the County of Suffolk in said Commonwealth, be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper.

SAMUEL A. MYERS,
HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,

By their Attorney,
EDWARD F. McCLENNEN.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, SS.

Edward F. McClennen being duly sworn deposes and says that he is the counsel for the above-named petitioners and that the matters set out in the foregoing petition are true of his own knowledge.

EDWARD F. McCLENNEN.

Subscribed and sworn to
before me, this sixth
day of July, 1922.
GEO. P. DAVIS,
Notary Public.
My commission expires March 12, 1926.

I do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay, and that in my opinion the case is a proper one for the issuance of the Writ of Certiorari prayed for.

EDWARD F. McCLENNEN,
Counsel for the Petitioners.

SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1922.

SAMUEL A MYERS AND HARRY MEYERS,
CO-PARTNERS AS S. A. & H. MYERS,

v.

INTERNATIONAL TRUST COMPANY.

ACCEPTANCE OF SERVICE.

International Trust Company, by its attorney of record, hereby accepts service of notice that a Petition for Writ of Certiorari in the above entitled cause will be applied for in this Court on July 31, 1922 and will be submitted to this Court at the opening of the Court at its first sitting thereafter, or as soon thereafter as counsel can be heard in pursuance of its rules in such cases made and provided, and that said respondent has received a copy of this petition and the brief in support thereof and of the entire transcript of the record of the case.

Dated the sixth day of July, 1922.

JOHN R. LAZENBY,
Attorney for the Respondent.

SEP 2

Supreme Court of the United States

No. 5[redacted]89

OCTOBER TERM, 1922

SAMUEL A. MYERS and HARRY MYERS
copartners, as S. A. & H. MYERS
Petitioners

v.

INTERNATIONAL TRUST COMPANY
Respondent

Brief in Opposition to Petition for Writ of Certiorari

JOHN R. LAZENBY
For the Respondent

The Corporation Press, Inc., Cooperstown, N. Y.
New York City Office, 220 Broadway.

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Supreme Court of the United States

October Term 1922. No.

SAMUEL A. MYERS and HARRY MYERS, copartners, as S. A. & H. MYERS,
Petitioners,
v.
INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL TRUST COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement

The Myers are defendants in an action of tort founded upon a claim that the Myers had obtained money from the International Trust Company, by reason of fraudulent representation intentionally made for the purpose of obtaining the money. The case was tried before a jury which rendered a verdict in favor of the International Trust Company. The Myers by exceptions took the case to the Supreme Judical Court of the Commonwealth of Massachusetts, which after argument overruled the exceptions. The Myers now bring this petition for a writ of certiorari on the ground that:

(1) The Trial Court and the Supreme Court failed to allow the claim of the Myers to a right, privilege and immunity under the statutes of the United States by ruling that a confirmation of a composition in bankruptcy did not bar the claim of the International Trust Company, and

(2) That the decision of the Trial Court and of the Supreme Court is in conflict with the decisions of the Supreme Court of the United States and, consequently, tends to bring into contempt for inefficacy the judgments rendered in the Courts of the United States.

The petitioners also ask this Court to review the evidence and to decide that there was no evidence upon which the jury in the Trial Court was warranted in finding that (a) the statement was false, and (b) the petitioners deliberately and intentionally deceived the Bank.

The facts upon which this litigation arose were as follows:

The International Trust Company is a Bank carrying on a banking business in Boston, Massachusetts. The Myers were a partnership carrying on a clothing business in Boston. Prior to 1910 the Myers had dealt with the Bank, keeping a deposit and obtaining loans from time to time. This practice continued through the year 1916, the method of doing business being that the Myers submitted each year a statement of their financial condition for the purpose of giving information to the Bank as to whether they were a reasonable risk for such loans as the Bank might make. These statements appear in evidence in Exhibits 1 to 5 (Rec. pp. 15, 16, 17).

In March, 1916 the Myers applied to the Bank for credit, and the Bank by a letter dated March

22, 1916 requested that the Myers furnish upon a form enclosed a statement of their financial condition (Exhibit 9) (Rec. pp. 17, 18.) The Myers did not use the form but made up a statement of their own and submitted that (Exhibit 6). Upon the one so made and upon the statements on file the Bank discounted notes and paid the Myers $20,000 (Rec. p. 20). The form of statement which had been enclosed in Exhibit 9 had on it the question:

> "Are any of above assets pledged or liabilities secured by collateral judgment notes or otherwise?" (Rec. p. 29).

In February, 1917 the Myers were petitioned into bankruptcy and immediately offered a composition, which composition was finally confirmed and a dividend paid. The Bank proved its claim *on the notes* and received its dividend (Rec. p. 25).

On July 22, 1915, the Myers had made an agreement with the Commercial Investment Trust of New York (Exhibit 8) whereby the Myers obtained from the Trust advances from time to time of sums of money on an assignment of accounts due the bankrupt for merchandise which they had sold (Rec. p. 17). The agreement is long and complicated, but it appears that the practice was for the Myers to sell their products, send out the bills and send a duplicate of the invoice to the Trust (Rec. p. 17). The Trust then paid 78% of the amount of the invoice, although by the terms of the agreement they were required to pay 80%, the 2%, however, being retained by the Trust as a reserve fund for interest and expenses and was adjusted later (Rec. p. 26). Upon the receipt by the Myers of payment of any account which they had assigned to the Trust this payment was remitted to the Trust which paid off its

advances and charges, and refunded the balance to the Myers.

The rate of interest which the Myers were to pay was crushing. The agreement provides for 6% upon the sum advanced and in addition expenses and commissions which expenses and commission shall be 1% of the face amount of the accounts assigned for the first 15 days, and one-half of one per cent of the first $100,000 face value of accounts assigned, and 1/30 of one per cent per day of the face amount of all accounts during the time while such accounts were held by the Trust (Exhibit 8). In brief, the Myers were paying more than 18% on all sums advanced. This agreement was in full force and effect during 1916 at the time the statement (Exhibit 6) was made, and at the time the money was borrowed from the International Trust Company, but the Myers kept the fact that there was such an agreement and the contents of it entirely concealed, and permitted the Bank to advance the $20,000 in ignorance of the fact that they had "hocked" their accounts receivable.

The statement (Exhibit 6) contained no word of this assignment but on the contrary induced any person examining it to believe that no such agreement was in existence. The statement set out that the Myers had accounts receivable on January 1, 1916, of $58,425.06, although the truth of the matter was that on that date the Myers had assigned $27,000 of these accounts (Rec. p. 23). In short, the statement set forth that among the assets were accounts receivable drawing interest, while the truth of the matter was that of those accounts receivable $27,000 were costing the Myers 18% in interest. On the day the statement was given to the Bank, March 27, 1916, this $27,000 had risen to $46,441.13, so that the accounts receivable owned by them on the 27th of March

were actually less than half of what the statement showed (Rec. p. 23).

To balance the statement it was necessary to place these sums among liabilities and, consequently, they were put in among accounts payable, (Rec. p. 27), although accounts payable have for the usual and ordinary meaning sums due on account of merchandise, labor, etc., (Rec. pp. 18, 23), and not money loaned at 18% interest, (Rec. p. 23) as the Myers well knew.

Under such circumstances the Bank brought suit to recover the damage which it had suffered by reason of the misrepresentation. The defendants denied the fraud, and in addition set up that the debt was discharged by reason of the composition in bankruptcy and, further, that the Bank had objected to the confirmation of the composition on the ground of fraud, and that the confirmation of the composition in the Bankruptcy Court was *res adjudicata* on the question of fraud.

It should be noted that the Bank brought its suit to recover damages by reason of the fraud perpetrated upon it and not to recover on the notes.

ARGUMENT

I

The petition should be dismissed.

While the Bankruptcy Act defines what debts are discharged by the Act and what debts are not, it is not usual to permit a party dissatisfied with the findings of a jury which acted under proper instructions to ask the United States Supreme Court to review the findings of fact of that jury, particularly when the State Supreme Court has held in a unanimous opinion that there was ample evidence to warrant the jury reaching its verdict. The question is not one of general importance.

The questions involved in this case have already been decided in *Friend v. Talcott,* 228 U. S., 27, and no reason is given in the petition for the reopening of that decision. The Supreme Judicial Court of the Commonwealth of Massachusetts and the United States Courts have had no difficulty in following the decision.

II

There was ample evidence from which the jury was entitled to find that the Myers obtained money with the intention to deceive by means of a false statement.

The petitioners do not claim that there was error in the instructions which were given to the jury on this question or that the Trial Court or the Supreme Judicial Court did not follow the United States Courts in the definition of the fraud which the Trust Company must prove in order to

satisfy the Bankrupt Act (Rec. pp. 32, 33, 34, and 35. Requests for instructions No. 3, 4, 5 and 6 at Rec. p. 35).

It is claimed by the Myers that the statement was not false.

The Bank alleged that it had been deceived by reason of the Myers failing to give information as to a material change in the method of doing business by concealing the fact that the Myers had assigned accounts receivable, by giving a statement which was in itself false, not only by not setting forth a true, accurate and complete statement of their financial condition, but also by having absolutely false entries in the statement itself.

The Trial Court held that there was sufficient evidence upon which the jury might find that the statement was false. The Supreme Judicial Court was satisfied that the Trial Court was correct.

The Bank in its letter of March 22, 1916, (Exhibit 9), asked the Myers "to send us on the enclosed form statement of your financial condition."

The statement purported to be "a copy of our financial statement taken from inventory, January 1, 1916". It shows accounts receivable of $58,425.06. Samuel Myers testified (Rec. p. 18):

> "Accounts receivable meant accounts due us from customers for garments and clothing which we had sold and shipped to them"

Glass, the bookkeeper in charge of the books of the Myers, testified (Rec. p. 23):

> "At the time the statement of March 27, 1916, Exhibit 6, was made, I think something like $27,000 of accounts receivable had been assigned as of 1st January, 1916. The books show that on March 27th, I should say we had assigned accounts to the extent of $46,441.13."

Samuel Myers testified (Rec. p. 17):

> "It (item of accounts receivable) also contained all the accounts which we had assigned. It included the notes which we had assigned to the Investment Trust."

There can be no question from this testimony that the statement was false in that it set forth that the Myers owned accounts receivable when the fact was that they did not.

Further, the statement showed that the Myers owed accounts payable (Exhibit 6).

Myers testified (Rec. p. 18):

> "Accounts payable meant accounts owed by us for merchandise which we had bought."

Glass testified (Rec. p. 23) that the accounts payable meant money owed for services, merchandise and that the general accepted term "accounts payable" would not be interpreted according to the ethics of accountants as including money which had been borrowed. Glass further testified (Rec. p. 24):

> "The money received from these assigned accounts was not an obligation to pay for merchandise."

The fact was that this item included the money which the Myers owed the Commercial Investment Trust for money advanced by that Trust upon which they were paying 18% interest, although, as Myers testified (Rec. p. 18):

> "The item notes payable in the statement (Exhibit 6) represents money borrowed whether we gave a note or not."

The item for notes payable clearly represented that the only money borrowed was included in that item.

In short, the statement represented that on Jan-

uary 1st the Myers owned $27,000 of quick assets and on the 27th of March, $46,441.13, while as a matter of fact they did not. It concealed entirely the fact that the Myers were paying 18% interest on money which they had borrowed.

Further, the statement was false in the general representation which it held out.

The Myers had been dealing with the International Trust Company for fifteen years or more, and had been discounting notes and borrowing money from time to time. They had given a financial statement each year (Rec. p. 15). In 1903 they were asked if any accounts were assigned (Rec. p. 18); when they made this statement (Exhibit 6), they were asked in the form which came with the letter (Exhibit 9) "are all bad or doubtful assets included in above statement? Are any of above assets pledged or liabilities secured by collateral, judgment notes or otherwise?" In 1903 they had answered that they had not assigned accounts, and in 1916 by their failure to use the form sent by the Bank they represented to the Bank that the answer to both these questions was in the negative.

Jewett, the officer of the Bank who passed upon the question of loans to be made to the Myers, testified:

> "These (Exhibits 1 to 6) are the statements I used in giving credit to the Myers. * * * Prior to October 1916, I did not have any conversation with them (Myers) as to the discounting of notes. When I discounted the notes in question I relied upon the signed statement on file to determine whether credit should be given to the Myers. I did not limit it to one statement, but relied on this throughout a number of years. When I passed on the statements I relied on the accounts receivable as having the ordinary and usual meaning in business. * * * At

> the time the notes were presented I had no information that the Myers had assigned their accounts receivable to the Commercial Investment Trust. The Myers did not disclose in any form any information that they had assigned their accounts receivable. The statement in Exhibit 6 did not show that certain accounts receivable had been assigned" (Rec. p. 20).

He further testified that he did not know the Myers were paying interest at the rate of 16% to 18% for money borrowed, nor did the Myers give any information in regard to that rate, otherwise

> "we would not have discounted those notes. I have had experience in discounting and banking and my experience has been that when persons pay 16% to 18% for money they are in a bad condition" (Rec. p. 21).

In July, 1915, the Myers had made this agreement with the Commercial Investment Trust and proceeded to assign accounts from time to time, always in increasing amounts. As Samuel Myers testified:

> "When I gave the notes, Exhibit 7, to the Trust Company I did not at any time tell them of this agreement with the Commercial Investment Trust or that we were putting up our accounts receivable for money loaned to us" (Rec. p. 18).

There can be no question that the statement was false, not only as set forth above but also in the amount of the "net capital" of $83,510.33, for with such a capital it would have been entirely unnecessary to have inaugurated the system of assigning the accounts receivable. Further, it completely failed to set out a change in the method of doing business and the mere fact of it being delivered to the Trust Company in silence led the

Trust Company to believe that the Myers were carrying on their business in the old reliable and honest way.

The Myers urge that there was no evidence of intention to deceive (Brief p. 9).

From all the evidence there can be no question that the Myers intended to get money upon a statement which they knew to be false and intended to deceive.

Samuel Myers testified:

> "I intended that the International Trust Company rely on it (the statement) as being accurate and true. I gave it (the statement) to them so that they would know our condition" (Rec. p. 19).

Glass, the bookkeeper, testified:

> "When this statement, Exhibit 6, was made, we intended that whoever saw it should rely on it, and that they should take it just as it was made out" (Rec. p. 27).

Samuel Myers knew that these statements were given to the Bank to enable the Bank to determine what their financial condition was (Rec. pp. 16 and 17). The form used in 1903 and that sent with the letter of March 27, 1916 contained direct questions as to whether the assets were pledged or accounts assigned. He knew that the form included in Exhibit 9 contained a similar question. He knew the meaning of accounts receivable and he knew that the item of accounts receivable in his statement (Exhibit 6) included all which he had assigned (Rec. p. 17). He testified how he conducted his business with the Commercial Investment Trust. He knew the terms of that contract including the fact that he was paying 18% interest. He knew of the various meanings of the terms in the statement and of the false entries. He knew of the change in his method of doing business. With all this knowledge he

remained silent and permitted the Trust Company to lend him money.

Nor can he shelter behind the testimony of his bookkeeper, Glass. Glass knew the terms of the Commercial Investment Trust agreement (Rec. p. 22); he knew the meaning of accounts payable and accounts receivable; he knew that $27,000 worth of accounts were assigned, and that the amount of these assigned accounts increased during the year 1916 to over $100,000 (Rec. pp. 23 and 27); he knew that the item accounts payable did not disclose the interest rate of 18% (Rec. p. 24). His testimony can leave no question that he was thoroughly familiar with the entire situation and with that form before him prepared the statement to be sent to the International Trust Company under the direction of Samuel Myers.

Any person charged with intentional fraud will stoutly deny that he ever intended to deceive, and the intention can be found only from what happened. Ample circumstances were put in evidence to clearly establish the deliberate intention to deceive. The cases cited by the petitioners, to the effect that the denial by Myers and Glass of the intention to deceive left no evidence upon which the jury could find a deliberate intention to deceive, have no application.

The Court will hesitate to review the findings of a jury which saw the witnesses and heard the manner in which these witnesses testified, or to set aside the rulings of the Trial Justice on questions of fact.

III

The confirmation of the composition did not discharge this debt.

At the time the International Trust Company made the advances it had two separate and distinct causes of action: (a) an action of contract founded upon the contractual obligations created by the notes, and (b) an action of tort founded upon the deceit of the Myers in inducing the bank ta pay money upon misrepresentations intentionally made.

The Bankruptcy Act recognizes these two distinct causes of action and discharges the debtor from his liability on the contracts and denies him the discharge from his liability for the deceit.

The petitioners in their brief, page 4, admit that the fraud would not be discharged by the composition; otherwise the suggestion that the bank might have ignored the composition and waited until after the confirmation before setting up fraud, would have no force. The Bankruptcy Act, Sections 14-b and -c, 17 and 63 provide that the confirmation of a composition does not release a bankrupt from liabilities for obtaining property by false pretenses or false representations.

The claim of the Trust Company upon which this suit was brought was *not* proved in the bankruptcy proceedings and dividends in composition were *not* received upon it. The statement at page 5 of the Petitioners' brief, "The respondents' claim relied on in the State Court was actually proved," is not correct. The claim proved in the bankruptcy proceedings was that founded on the notes.

The claim in tort was not provable.

In *Schall v. Camors,* 251 U. S., 239, commercial paper was sold by a partnership by means of false representations. Both the partnership and individual partners were petitioned into bankruptcy. The creditor proved his claim on the notes against the partnership estate. He also proved against the individual estates of the partners a claim for damages suffered by reason of the misrepresentation. Upon the petition of the trustee in bankruptcy the claim against the individual estates was rejected on the ground that this claim was one in tort and hence was not provable.

In *Talcott v. Friend,* 179 Fed., 676, (C. C. A. 7th), Affirmed, 228 U. S., 27. The debtor obtained credit for merchandise upon a statement which was false. It was held that the creditor could prove his claim in contract in the bankruptcy proceedings and also maintain an action after the bankruptcy proceedings to recover damages for the injury suffered by reason of the misrepresentation.

The fact that the Trust Company proved its claim on the contracts, the notes, does not affect this right to maintain this action of fraud.

In *Frey v. Torrey* 70 N. Y., App. Div., 166, aff'd in 175 N. Y., 501, the fact that the plaintiff had proved his claim in bankruptcy on a contract was held to be no bar to maintaining an action in the State Court for deceit.

Standard Sewing Machine Company v. Kattell, 132 N. Y. App. Div., 539.

In re Menzin, 238 Fed., 773, (C. C. A. 2nd).

Zimmern v. Blount, 238 Fed., 740, (C. C. A. 5th).

In re Groodzinsky, 248 Fed., 753, (D. C. Ga.).

Forsyth v. Vehmeyer, 177 U. S. 177.
Crawford v. Burke, 195 U. S., 176, 178.

The scope of the discharge which determines whether particular debts are included in the discharge or not has nothing to do with the question of whether a discharge shall be granted.

In re Lockwood, 230 Fed., 158, 160, (D. C., E. D. of N. Y.)

The present case is not one where the plaintiff may treat his cause of action as one *in assumpsit*, electing whether he will treat the fraud as a quasi-contract and waive the contract, but it is one where there are two separate and distinct rights which give rise to separate and distinct causes of action.

Kreitlein v. Ferger, 238 U. S., 21, cited in the Petitioners' brief at page 6 is no authority that the claim now before the Court was a provable claim. At page 27 it is said:

> "On the part of Ferger it is said that this suit is on a judgment for $300 rendered in an action not 'founded upon a contract express or implied—and it seems to have been claimed that the judgment was not a provable debt within the meaning of Section 63-a-4 of the Bankruptcy Act. But the special finding of the jury in that case showed that in purchasing the flour Kreitlein had not made any fraudulent concealment or misrepresentation as to his financial condition. Besides the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action *in trover*, as for a fraudulent conversion, instead of *assumpsit* for a balance due on open account. *Crawford v. Burke*, 195 U. S. 176, 193."

Crawford v. Burke, 195 U. S., 176, cited on page 6 of the Petitioners' brief, has no application to

the present case. It is a decision on the Bankruptcy Act before the Amendments of 1903. It holds merely that the Act as it then existed excepts from the operation of the discharge only judgments founded on a fraud and not claims based on fraud. The Act has since been amended to enlarge the scope of debts not discharged. Further, the cause of action was based on conversion of stock, so that the creditor had a right to elect whether he would sue in contract or in tort.

Tindle v. Birkett, 205 U. S., 183, is also a judicial determination of the statute before amendment, and the Court expressly states that *Crawford v. Burke* governs that decision.

IV

The decision of the United States District Court in Bankruptcy, in confirming the composition was not RES JUDICATA upon the question of fraud.

The Trial Court properly excluded the record in the bankruptcy proceedings.

Section 12-d of the Bankruptcy Act requires the confirmation of a composition, provided the bankrupt has not been guilty of any acts which will bar a discharge, and Section 14-b-3 refuses the discharge if the bankrupt has obtained money or property on credit upon a materially false statement in writing made to "any person or his representative" for the purpose of obtaining credit from such persons.

Any creditor may object to the confirmation of composition irrespective of whether the false statement was made to him or to another creditor.

In re Miller, 192 Fed., 730 (D. C., N. D., Ia.).

Talcott v. Friend, 179 Fed., 676, 681 (C. C. A. 7th).
In re Brener, 166 Fed., 930 (D. C., S. D., N. Y.).
In re Kretz, 212 Fed., 784, 786 (D. C., W. D., Wash.).

The jury has found that the statement was intentially false within the definition of the Federal cases construing the Bankruptcy Act.

The parties in the bankruptcy proceeding are not the same as the parties in this suit. It was the general mass of creditors against the bankrupt and not one particular creditor against the bankrupt.

The question at issue is not the same. The sole question in the bankruptcy proceeding was whether the debtor should be discharged from his provable debts, and not whether any particular debt was discharged. In the present case the sole question is whether the Myers had obtained money or credit from the plaintiff upon an intentionally false statement, and hence *whether this debt was a provable debt.* The cases cited above hold that it was not a provable debt.

The Bankruptcy Act brings this position out clearly. Section 14-b-3 provides that there shall be no discharge if property or credit has been obtained by reason of false statements in writing to the person giving the credit or property, but Section 17-a provides that a discharge does not release the bankrupt from liabilities for obtaining money by false representations or pretenses, even though not written. This shows clearly that the statute contemplates that certain acts shall be a bar to the discharge, and that certain other acts shall prevent the release of the bankrupt from the liability arising from them, although those acts

alone are not a bar to the discharge of the bankrupt.

In *Talcott v. Friend,* 179 Fed., 676, 681:

> "Objections to discharge may be made by any 'party in interest.' That term certainly includes all creditors who have had their claims allowed and who have participated in the distribution of the insufficient assets. The third ground of objection is available if the bankrupt in the manner therein stated 'obtained property on credit from any person.' Any creditor may therefore urge this objection, whether he was the defrauded party or not. *In re Harr* (D. C.) 143 Fed., 421. The application for a discharge consequently tenders an issue to all parties in interest. If all remain silent, all are bound by the finding which follows the failure to present objections. All equally have the right and the opportunity to object; but if only one does so, he cannot keep the outcome to himself —all share in the result. Thus identity in interest of the parties to the application for discharge and objections thereto and the parties to this action for deceit is wanting. In the bankruptcy court the parties were the defendants in the capacity of insolvent debtors and the plaintiff in the capacity of a representative of all parties interested in opposing the discharge, while in this action the parties are the defendants in the capacity of fraud doers (separate and distinct from their character of contractors, as hereinbefore pointed out) and the plaintiff in the capacity of the solitary victim of their deceit. So, also, there is lacking an identity of issues, for in the bankruptcy proceeding the only proper issue was the bankrupts' right to a discharge as against all parties in interest. *In re Thomas* (D. C.) 92 Fed., 912; *In re Rhutassel* (D. C.) 96 Fed., 597.
>
> "Our conclusion, therefore, is that plaintiff's act in pleading defendants' deceit in

> opposition to the application for a discharge, and the aforesaid finding of the court with respect thereto, fail to bar plaintiff from maintaining this action."

In *Friend v. Talcott*, 228 U. S., 27, the facts are almost identical with the facts in the present case. A partnership, consisting of Friend and some others, was adjudicated bankrupt; the bankrupts offered a composition; Talcott, a creditor whose claim in contract had been allowed, objected to the composition on the ground that the bankrupts had obtained from him credit by means of false reports as to the financial condition of the firm. The objections were overruled on the ground that the statement was made to a commercial agency, and the composition was confirmed. Later Talcott brought suit to recover the damages suffered by reason of the false statement, relying on the same deceit set out in his objections to the composition, and the damages sought were the difference between the contract price and the amount which Talcott had received in the composition. The defendants in addition to the general issue set up *res judicata*.

The Court held that the action could be maintained and that the confirmation of the composition was not *res judicata*. At page 40 the Court said:

> "While the considerations just stated dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to *res judicata*, that is, a confusion of thought arising from treating things which are different as one and the same. To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankrupt law, the distinction which it makes between the general discharge and the right

of a particular creditor to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects —that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (Sec. 14c, 30 Stat. 550) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge. . . .'

"Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata*. The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformably to

> the statute as to the absence of fraud or other wrong doing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation."

The *Talcott* case is not distinguishable. The fact that the representation was made through a commercial agency, and that the Bankruptcy Court in confirming the discharge did not pass on the question of whether Friend had obtained credit by misrepresentation, does not make any difference. Both the Circuit Court of Appeals and Supreme Court considered this argument and rejected it, as appears from the portions of the opinions set out above.

Even conceding the defendants' argument that the case of *Friend v. Talcott* might have been decided on a narrow ground, the fact remains that the Court did establish exactly the principles for which the respondent contends in this case, and the respondent submits that the trial Court ruled properly in following this decision of the United States Supreme Court.

The Circuit Court of Appeals for the Second Circuit has followed the *Talcott* case in *in re Menzin*, 238 Fed., 773 (C. C. A. 2d).

In that case there was an order by the District Court staying petitioners from proceeding under their specifications filed in opposition to the bankrupts' discharge, unless they discontinued their action brought in the State Court. The debtor was adjudicated bankrupt and the creditor proved his claim for goods bought. The creditor then brought suit in the State Court to recover damages by reason of the bankrupt having obtained the goods in question on credit by fraudulent representations. The Court held that such a suit in the State Court could be maintained in spite of the fact that a claim in contract had been allowed in the bankruptcy proceeding.

At page 774 the Court said:

> "(3) We are quite clear that the petitioners may proceed with their suit in the state court in tort notwithstanding that they first proved their claims in bankruptcy on contract. In *Friend v. Talcott*, 228 U. S., 27, 33 Sup. Ct., 505, 57 L. Ed., 718, the Supreme Court held that a creditor who had unsuccessfully opposed a composition and discharge in bankruptcy, and who had accepted his dividend thereunder, might still sue for the balance of his claim in the state court, on the ground that the indebtedness was fraudulently contracted, and therefore excepted by the act from the operation of the discharge."

The interpretation of the *Talcott* case which the respondent urges is the same as already given by the Federal Courts.

In *Pell v. McCabe*, 256 Fed., 512 (C. C. A. 2d), at page 517, it is said:

> "*Friend v. Talcott*, 228 U. S. 27, 33 Sup. Ct., 505, 57 L. Ed., 718. In the case cited the Court holds that a creditor who had unsuccessfully opposed a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, and accepted a dividend, and who then sued for the balance on the ground that the debt was excepted from the discharge, had not waived his right to sue on the tort by accepting the dividend; and the Court also held that the granting of the discharge was not *res judicata* of the claim for the balance of the debt."

See also *in re Groodzinsky*, 248 Fed., 753 (D. C. N. D. Ga.), at pages 754, 755.

The petition should be denied.

Respectfully submitted,

JOHN R. LAZENBY,
For the International Trust Company.

SEP 24 1923
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. 89

SAMUEL A. MYERS ET AL

v.

INTERNATIONAL TRUST COMPANY

BRIEF FOR PETITIONERS SAMUEL A. MYERS and HARRY MYERS

DUNBAR, NUTTER & McCLENNEN,
EDWARD F. McCLENNEN
For the Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 89

SAMUEL A. MYERS and HARRY A. MYERS
CO-PARTNERS AS S. A. & H. MYERS

v.

INTERNATIONAL TRUST COMPANY

BRIEF FOR PETITIONERS SAMUEL A. MYERS and HARRY MYERS

SUMMARY

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THE ERROR CLAIMED

The District Court of the United States for the District of Massachusetts and the Circuit Court of Appeals for the First Circuit, after trial of the issue between the parties to this case, decided that the defendant-petitioners had not made a false statement. The Superior Court of Massachusetts and the Supreme Judicial Court of that Commonwealth erroneously declined to give effect as *res adjudicata* to this decision.

The decision was reached in confirming an offer in composition in bankruptcy and in granting the consequent discharge in bankruptcy. The petitioners' claim is based not on the discharge in bankruptcy, as such, but on the decision that the statement was not false; a decision which was made after active trial of the issue between the parties and necessary to the judgment confirming the composition and granting the discharge.

STATEMENT OF FACTS

On March 27, 1916, the defendant-petitioners for certiorari, Samuel A. Myers and Harry Myers, as co-partners under the name of S. A. & H. Myers, of Boston, in response to a letter from the plaintiff-respondent International Trust Company, sent a statement of their financial condition on January 1, 1916, prepared by the petitioners' bookkeeper and in accordance with the petitioners' books. Subsequently, the respondent made loans to the petitioners. In January, 1917, an involuntary petition in bankruptcy was filed against the petitioners. They made an offer of 40% in composition. A majority of the creditors accepted the offer. It was referred to the Referee in Bankruptcy. He recommended its confirmation. There-

upon, on March 23, 1917, the petitioners filed an application for confirmation of the composition. The respondent International Trust Company by its counsel, John R. Lazenby, now counsel in the case at bar, entered an appearance in opposition to confirmation and assigned as a specification of objection that the petitioners had obtained loans from the respondent "by the statement made in writing to the International Trust Company, that on the first day of January, 1916, the accounts receivable amounted to $58,425.06; that the alleged bankrupts in said statement set out that they owed notes payable amounting to $59,713.12; that the alleged bankrupts did not include in said item of notes payable a note of $3,000 secured by a mortgage of certain real estate, and said statement was materially false and was made for the purpose of obtaining the aforesaid sums on credit." "Said falsity being that the alleged bankrupts concealed and omitted to set forth in said statement the fact that of the said accounts receivable a certain portion in the neighborhood of $20,000 (the exact sum being unknown to your petitioners) had been assigned and set over to the Commercial Investment Trust, and further, that the accounts receivable as set forth in said statement do not amount to the said sum of $58,425.06." (R., pp. 51, 54.)

These objections were referred to the Referee. He heard the petitioners and the respondent International Trust Company. He found and reported that the petitioners had made the financial statement of March 27, 1916, and that the International Trust Company relied on it in making the loans, but that when the financial statement was made it was a **true statement** and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time and kept

by an experienced, competent bookkeeper, and that "I do not find any evidence that the bankrupts or either of them falsely or purposely concealed or omitted to set forth in said statement the amount of the accounts assigned to the Commercial Investment Trust. I therefore find and so report, that according to the method of bookkeeping employed by the alleged bankrupts, the amount of the accounts receivable, January 1, 1916, was correctly set forth in said statement. I therefore find, and so report, that this objection is not sustained." (R., p. 58.) The Referee reported the testimony, and this testimony was substantially the same testimony which was introduced subsequently at the trial, in the Superior Court, of the case now at bar.

The case was heard in the Bankruptcy Court by the District Judge after the return of the report of the Referee. The District Judge confirmed (245 Fed. 110; R., p. 60) the finding of the Referee, that the petitioners did not intend the statement to be false, did not believe that it was false, and had no purpose dishonestly to obtain credit, and decided that it was not the duty of the defendants to state the fact of the assignment, but that the creditor, if it considered the point material, ought to have inquired about it, and that the statement ought not to be extended by implication to include recitals which it did not contain and which were never made by the alleged bankrupts, the petitioners. Accordingly, on May 28, 1917, the District Court confirmed the composition.

The International Trust Company appealed to the Circuit Court of Appeals for the First Circuit. That court accepted the reasoning and conclusions of the District Judge and on August 25, 1917, affirmed the order confirming the composition (245 Fed. 110, 112.) A judgment was entered accordingly, with a mandate to

the District Court. This judgment was "that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to his discharge." (R., pp. 41, 42.)

On November 6, 1917, the International Trust Company brought the suit at bar against the petitioners to recover the unpaid balance (R., p. 27) and sought to avoid the discharge on the ground that the liability to the International Trust Company was for obtaining money by false pretenses or false representations made in writing by the petitioners to the respondent. The petitioners duly pleaded, and offered the bankruptcy record in evidence. It was excluded, but was made by reference a part of the bill of exceptions subsequently allowed. (R., pp. 20, 48 to 97.)

The petitioners in offering the record contended that the effect of it as an estoppel was to be determined by the laws of the United States. (R., p. 21.) At the close of the evidence the petitioners requested the court to instruct the jury that:

> "10. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendant's offer in composition establishes conclusively for the purposes of the present case that the statement was not false."
>
> "11. The finding of the United States Court in the trial of the plaintiff's objections to the confirmation of the defendant's offer in composition establishes conclusively for the purposes of the present case that the statement was not made with an intention to deceive."
>
> "8. The mere failure to state that the accounts had been assigned as collateral security to the Com-

mercial Investment Trust would not make the statement false."

"12. The discharge of the defendants by the confirmation of the composition is a bar to this action." (R., p. 21).

These requests were refused, and the petitioners' exceptions were saved. (R., p. 26). The jury returned a verdict for the respondent International Trust Company for $14,304.49, March 2, 1921. (R., p. 6.) The Supreme Judicial Court overruled the petitioners' exceptions. (R., p. 48.)

The evidence at the trial in the Superior Court was like the evidence at the trial in the Bankruptcy Court and showed the following facts: The petitioners were a partnership engaged in the manufacture of clothing. They dealt with the plaintiff as a bank of deposit and also borrowed money from it. Prior to sending the statement of March 27, 1916, above referred to, the petitioners, in July, 1915, had entered into a contract with the Commercial Investment Trust under which this Trust agreed "to make advances to first party upon the assignment to it as collateral security therefor" of the petitioners' accounts receivable. In the financial statement of January 1, 1916, the item of accounts receivable was the amount of accounts receivable which the petitioners then actually had. No deduction was made from that amount for those accounts which had been assigned as collateral security under this contract with the Commercial Investment Trust. On the other hand, the accounts payable, as shown on the statement, included an amount equal to all accounts which had been so assigned for the advances which this Trust had made to the petitioners. Accordingly, the net capital was not overstated. The petition-

ers, under the arrangement with the Commercial Investment Trust, continued to hold and to collect these collateral accounts, remitting the proceeds to the lender in reduction of the loans. The petitioners did not have any conversations with the plaintiff's officers or say anything beyond what appeared in the financial statement itself. The petitioners testified that they had no intention to deceive the plaintiff, and that on receiving the request for a statement they turned it over to the bookkeeper and asked him to get out a statement and gave no directions to him, and that they believed that the statement as they signed it was true. Glass, the bookkeeper, called as a witness by the plaintiff, testified that he believed that the statement was true and that he had no intention to deceive. The contract with the Commercial Investment Trust contained provisions for the payment of interest at rates determined by the amount of accounts assigned during the course of a year. As the amount so assigned exceeded $100,000, the interest actually paid was one-thirtieth (1-30) of one per cent. (1%) a day on daily balances, — that is, 12 per cent. a year. This $100,000 was not composed of the amounts of assigned accounts receivable at any one time, but the total for a year, — that is, if they were 60-day accounts, $100,000 might be reached without the amount assigned at any time being more than $20,000. All loans made by the plaintiff to the petitioners during the six months following the receipt of the financial statement, were repaid. The first loan still remaining in part unpaid, was made October 2, 1916.

The plaintiff claims that the statement was false because it did not call attention to the contract with the Commercial Investment Trust and to the terms of the contract, and to the fact that some of the accounts receivable

were held by this Trust as collateral for advances. This claim of the plaintiff's, the petitioners contended and now contend had been conclusively determined against the plaintiff by the decision of the District Court of the United States and by the decision of the Circuit Court of Appeals. As appears from the bill of exceptions and from the opinion of the Massachusetts Court, the petitioners' present contention was duly made in the Superior Court, and in the Supreme Judicial Court, namely (1) that the estoppel by judgment of the United States Courts was to be determined by the laws of the United States, (2) that the exclusion of the records of the United States Courts was erroneous, (3) that the mere failure to state that the accounts had been assigned as collateral security would not make the statement false within the meaning of Section 17, Clause 2, of the Bankruptcy Act, (4) that **the finding of the United States Court established conclusively that the statement was not false, and that it was not made with an intention to deceive,** and (5) that the discharge was a bar.

ARGUMENT

The petitioners respectfully submit that:

FIRST. The United States Courts had decided after a trial of the particular issue between the same parties in the Bankruptcy Court, that the petitioners' representations were not false or made with an intention to deceive.

SECOND. This decision created an estoppel in the petitioners' favor against the trial of that same issue in the case at bar.

THIRD. This conferred on the petitioners, rights and immunities under the constitution and statutes of the United States.

FIRST

THE UNITED STATES COURTS HAD DECIDED AFTER A TRIAL OF THE PARTICULAR ISSUE BETWEEN THE SAME PARTIES IN THE BANKRUPTCY COURT, THAT THE PETITIONERS' REPRESENTATIONS WERE NOT FALSE OR MADE WITH AN INTENTION TO DECEIVE.

The Bankruptcy Act (U. S. Compiled Stats., Secs. 9598, 9601) provides that:

> "Sec. 14 (*b*) The judge shall hear the application for a discharge . . . . and discharge the applicant, unless he has . . . . (3) obtained money or property on credit, upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person . . . . "
>
> "Sec. 14 (*c*) The confirmation of a composition shall discharge the bankrupt from all his debts other than those agreed to be paid by the terms of the

composition and those not affected by a discharge."

"Sec. 17 (2) A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as . . . . (2) are liabilities for obtaining property by false pretenses or false representations . . . ."

The respondent projected the issue of falsity or not, before the United States Court. When the petitioners with the consent of a majority of their creditors applied for a discharge by confirmation of composition, the respondent, in order to protect its rights if the statement was false, needed not to object. The discharge would not release the petitioners from the respondent's claim if it arose from false representations (Sec. 17). If the respondent had not objected, the discharge would have been granted in course, without any trial of the issue of falsity. But the respondent did object and thereby required the United States Courts to try that issue; for not only is falsity excepted from a discharge but it is also a bar to a discharge, if the statement was in writing and made directly to the lender (Sec. 14). Unquestionably and admittedly, the statement was in writing and was made directly to the respondent. The only question was falsity, — an issue common both to an application for a discharge and to its effect on the particular claim, when granted.

This falsity is as the word is used in the Bankruptcy Act and is the same in the two sections.

At the respondent's behest, the United States Court heard that issue and all the evidence which the respondent offered in support of its contention. The Court then decided that the petitioners had obtained money on credit on a statement made in writing by them to the respondent but that the statement was not false or made with an intention to deceive.

SECOND

THIS DECISION CREATED AN ESTOPPEL IN THE PETITIONERS' FAVOR AGAINST THE TRIAL OF THAT SAME ISSUE IN THE CASE AT BAR.

There is no reason why the respondent should have a second opportunity to try the same issue. If the respondent had prevailed on it in the United States Court, the petitioners would have been denied their discharge (Sec. 14 (*b*)). Thus the petitioners had only one chance to get a bar to the respondent's claim. There is no reason why the respondent should have two chances to prevent that bar.

"Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based." (*Bluthenthal* v. *Jones*, 208 U. S. 64, 66.)

Equally, an adjudication granting a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the granting was based.

When the respondent offered the objection, the parties to the trial of it were the respondent and the petitioners.

"The general principle, applied in numerous decisions of this Court, and definitely accepted in *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 48-49, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for

the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited (p. 49): 'This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.' " (*Oklahoma* v. *Texas*, 256 U. S. 70, 85.)

This principle of *res adjudicata* or estoppel by judgment is one of the most firmly established.

United Shoe Machinery Corp. v. *United States*, 258 U. S. 451, 459.

Troxell v. *D. L. & W. R. R.*, 227 U. S. 434, 440.

Radford v. *Myers*, 231 U. S. 725.

Bates v. *Bodie*, 245 U. S. 520.

Postal Telegraph Cable Co. v. *Newport*, 247 U. S. 464.

Merriam v. *Whittemore*, 5 Gray 316, 317.

Burlen v. *Shannon*, 99 Mass. 200.

Foye v. *Patch*, 132 Mass. 105, 110.

Edwards v. *Columbia Amusement Co.*, 215 Mass. 125.

The test of its applicability between the same parties is not identity of cause of action, or of relief sought, but identity of issue tried so that the same evidence would support the finding.

United Shoe Machinery Corp. v. *United States*, 258 U. S. 451, 459.

In Re Samuels, 263 Fed. 561 (C. C. A. 2nd).

Manifestly that identity exists here. "False" as used in Section 17, Clause 2, of the Bankruptcy Act, excepting from the discharge, liabilities for obtaining property by false pretenses or by false representations, — means intentionally, morally wrong and not simply untrue.

Collier on Bankruptcy, 11th edition, pp. 432, 433.
Remington on Bankruptcy, 2d edition, Sec. 2747.
Brandenburg on Bankruptcy, 4th edition, Sec. 1559.
Loveland on Bankruptcy, 4th edition, Sec. 760.

The same was true of the word "fraud" as long as that remained in the act before the amendment of 1903 struck out the requirement of a judgment before bankruptcy.

Bullis v. *O'Beirne*, 195, U. S. 606, 619.
Tindle v. *Birkett*, 205 U. S. 183.
Crawford v. *Burke*, 195 U. S. 176.
Forsyth v. *Vehmeyer*, 177 U. S. 177.
Hennequin v. *Clews*, 111 U. S. 676.
Neal v. *Clark*, 95 U. S. 704.
Re Blumberg, 94 Fed. 476, 479.

The same is true of the word "false" as used in Section 14 (b), defining the grounds for refusing a discharge.

International Trust Co. v. *Myers*, 245 Fed. 110 (C. C. A. 1st).
Doyle v. *First National Bank*, 231 Fed. 649, 653.
Franklin v. *Monning Dry Goods Co.*, 217 Fed. 929 (C. C. A. 5th).
Peck v. *Lowenbein*, 178 Fed. 178 (C. C. A. 4th).
Gilpin v. *Merchants National Bank*, 165 Fed. 607 (C. C. A. 3d).

Both the respondent and the Massachusetts Court seem to assume that the petitioners contend that the granting

of the discharge *ipso facto* created the estoppel. It is not so. If the respondent had not succeeded in having the issue of falsity tried in the United States Court there would have been no finding upon it to pass into the judgment granting the discharge and no estoppel would exist.

Friend v. *Talcott*, 228 U. S. 27.

In *Friend* v. *Talcott*, the creditor attempted to prevent the discharge by showing that the bankrupt had made a false statement to the creditor or his representative. The only statement which the director could show was not to him or to his representative. Therefore, as there was no statement which met the requirements of Sec. 14 (b), it became unnecessary to consider whether the statement which had been made to a credit reporting concern was false; and the discharge was granted without considering falsity. Subsequently the creditor sued on the claim and sought to avoid the bar of the discharge, by showing that the statement was false and that he had given credit in reliance on it. Section 17 does not require that the statement be made to the creditor or his representative. Therefore, the statement which even if false would not prevent a discharge, would avoid the bar of the discharge, if false. So, for the first time falsity came up for trial and there was no *res adjudicata* or estoppel to prevent. Chief Justice White, in so holding, said that there was no "identity of cause between the two cases" and "It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as *nothing in the assertion of the right to be exempt from*

the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition. On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition." (p. 41.) (Italics not in original.)

In *Friend* v. *Talcott*, the issue of falsity had not been tried before. In the case at bar, it had. To paraphrase the language just quoted, the assertion of the right to be exempt from the operation of the discharge here relied upon involves traverse or denial of a relevant fact (i.e., non-falsity) established as a result of the approval of the composition. As to identity of cause, the two cases are opposites.

If the decision of the State Court stands, there is the unseemly result that after active trial of the same issue between the same parties on the same evidence, two unreviewable decisions stand, — the first that the statement was not false, and the second that it was false.

The decision of the United States Court involving falsity as used in a United States Statute is at least of equal dignity and persuasiveness with that of a State Court. Whether right or wrong, it was conclusive in the petitioners' favor.

THIRD

THIS CONFERRED ON THE PETITIONERS, RIGHTS AND IMMUNITIES UNDER THE CONSTITUTION AND STATUTES OF THE UNITED STATES.

(1) The petitioners have the judgment of a United States Court that their statement was not false. They

have the Federal right to have due effect given to that judgment as settling that issue. Of a similar question of estoppel by judgment of a United States Court, this Court in *Radford* v. *Myers*, 231 U. S. 725, 730, said:

> "Whether such effect was given as the former judgment required, presents a Federal question for determination. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 233. To determine this issue we examine the judgment in the former case, the pleadings filed and the issues made, and, if necessary, to elucidate the matters decided, the opinion of the court which rendered the judgment. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, supra, 234, and previous cases in this court therein cited."

Accordingly, in *Radford* v. *Myers* this Court did not dismiss the Writ of Error, but on the contrary considered the merits of the question and affirmed the judgment of the State Court on its merits.

In *Crescent City Live Stock Co.* v. *Butchers' Union Slaughter House Co.*, 120 U. S. 141, this Court held that the effect, of a decree of the Circuit Court of the United States granting a preliminary injunction to the Crescent Company, as probable cause for the injunction suit (notwithstanding the fact that the suit was held finally to be without merit), was a question arising under the Constitution and Laws of the United States (p. 146), and that the State Court in the subsequent suit at bar by the Butchers' Company against the Crescent Company for malicious prosecution in bringing the suit in the Circuit Court to obtain the injunction, had, by failing to give it that effect, deprived the Crescent Company of a privilege or immunity under the Constitution or Laws of the United States (pp. 146, 156, 158).

This establishes that the incidental effect as well as the direct effect of a decision of a Court of the United States presents a Federal question, and that the right of the prevailing party in that decision is a right or immunity under the Constitution and Statutes of the United States.

(2) The petitioners have the Federal right inherent in a discharge in bankruptcy. In *Crawford* v. *Burke*, 195 U. S. 176, 186, 194, this Court decided that whether the Supreme Court of the State had given proper effect to a discharge in bankruptcy in view of the circumstances under which the debt had been contracted, was a Federal question, and reversed the judgment of the State Court and gave judgment that the discharge was a bar.

As the statement was not false, the petitioners' only claim was a provable claim.

Schall v. *Camors*, 250 Fed. 6; 251 U. S. 239, 251.
Crawford v. *Burke*, 195 U. S. 176, 187-193.
Tindle v. *Birkett*, 205 U. S. 183.
Friend v. *Talcott*, 228 U. S. 27, 38.
Kreitlein v. *Ferger*, 238 U. S. 21, 27.

The petitioners had a Federal right to have the discharge given effect as a bar to a provable claim which did not arise out of a false statement involving moral turpitude.

There was no evidence of falsity and none of moral turpitude. The conclusive judgment of the United States Court established the contrary.

Respectfully submitted,

EDWARD F. McCLENNEN,
For the Petitioners.

October 1, 1923.

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Supreme Court of the United States

OCTOBER TERM 1923—No. 89.

SAMUEL A. MYERS and HARRY MYERS, copartners as S. A. & H. MYERS,

Petitioners,

v.

INTERNATIONAL TRUST COMPANY,

Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL TRUST COMPANY.

JOHN R. LAZENBY,
Attorney for International Trust Co.

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Supreme Court of the United States

October Term 1923—No. 89

SAMUEL A. MYERS and HARRY MYERS, copartners as S. A. & H. MYERS,
Petitioners,
v.
INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF FOR RESPONDENT INTERNATIONAL TRUST COMPANY.

Statement.

The Myers are defendants in an action of tort founded upon a claim that the Myers had obtained money from the International Trust Company, by reason of fraudulent representations intentionally made for the purpose of obtaining the money. The case was tried in the Superior Court, County of Suffolk, Commonwealth of Massachusetts, before a jury which rendered a verdict in favor of the International Trust Company. The Supreme Judicial Court of the Commonwealth affirmed the verdict. The Myers brought a petition for a writ of certiorari which petition was granted.

Facts.

The International Trust Company is a Bank carrying on a banking business in Boston, Massachusetts. The Myers were a partnership, origi-

nally organized in 1882 carrying on a business of manufacturing clothing in Boston. For fifteen years or more the Myers had dealt with the Bank, keeping a deposit account, borrowing money and discounting customers' notes. This continued through the year 1916, the method of borrowing being that the Myers submitted each year a statement of their financial condition for the purpose of giving information to the Bank to enable the Bank to determine what the Myers' financial condition was (Rec. p. 7). The statements from 1910 to 1915 appear in evidence in Exhibits 1 to 5 (Rec. pp. 8, 31-33).

In March, 1916, the Myers applied to the Bank for loans, and the Bank by a letter dated March 22, 1916, requested that the Myers furnish upon a form enclosed a statement of their financial condition (Exhibit 9, Rec. p. 41). (Rec. p. 10). The form had this question on it:

> "Are any of above assets pledged or liabilities secured by collateral, judgment notes or otherwise?" (Rec. p. 20).

The Myers did not use the form but made up a statement of their own and sent that (Exhibit 6, Rec. p. 9).

The statements throughout a number of years, including Exhibits 1 to 6, were used by the Bank in determining the Myers' financial responsibility and whether their notes should be discounted. $20,000 of notes were discounted in reliance of these statements (Rec. p. 11). The last note was dated December 18, 1916 (Rec. p. 9).

In January, 1917, the Myers were petitioned into bankruptcy and immediately offered a composition, which composition was finally confirmed

and a dividend paid. The Bank proved its claim on the notes and received its dividend (Rec. p. 17).

On July 22, 1915, the Myers had made an agreement with the Commercial Investment Trust of New York (Exhibit 8) whereby the Trust agreed to advance from time to time sums of money upon assignment of accounts for merchandise sold by the Myers (Rec. p. 9). The agreement is long and complicated, but it appears that the practice was for the Myers to sell their products, send out the bills and send a duplicate of the invoice to the Trust (Rec. p. 9). The Trust then paid 78% of the amount of the invoice, although by the terms of the agreement they were required to pay 80%, the 2%, however, being retained by the Trust as a reserve fund for interest and expenses and was adjusted later (Rec. pp. 9, 17). Upon the receipt by the Myers of payment of any account which they had assigned to the Trust this payment was remitted to the Trust which paid off its advances and charges, and refunded the 20% to the Myers (Rec. p. 17).

The rate of interest which the Myers were to pay was crushing; 6% interest upon the sum advanced and in addition "a reasonable compensation for the labor, services" of the Trust of 1% of the face amount of the account for the first 15 days (Rec. p. 36), and one-half of one per cent of the first $100,000 face value of accounts assigned, and 1/30 of one per cent per day of the *face* amount of all accounts during the time while such accounts were held by the Trust (Exhibit 8 Rec. p. 41). In brief, the Myers were paying *more* than *18%* on all sums advanced. This agreement was in full force and effect during 1916 at

the time the statement (Exhibit 6) was made, and at the time the money was borrowed from the International Trust Company (Rec. p. 14), but the Myers kept the fact that there was such an agreement and the contents of it entirely concealed from the Bank (Rec. p. 9), and permitted the Bank to advance the $20,000 in ignorance of the fact that the Myers had "hocked" their accounts receivable.

The statement (Exhibit 6) contained no word of this assignment. It set out that the Myers owned accounts receivable on January 1, 1916, of $58,425.06, although the truth of the matter was that on that date the Myers had assigned some $27,000. of these accounts (Rec. p. 14). In short, the statement set forth that among the assets were accounts receivable drawing interest, while the truth of the matter was that of those accounts receivable $27,000 were sold and were costing the Myers more than 18% in interest. On the days the statement was given to the Bank, March 27, 1916, this $27,000. had risen to $46,441.13, so that the accounts receivable owned by them on the 27th of March were actually less than one-quarter of what the statement showed (Rec. p. 14).

To balance the statement the Myers included in the accounts payable of $76,102.72, the $27,000. of assigned accounts (Rec. p. 18), although accounts payable have for the usual and ordinary meaning sums owed for merchandise bought, labor and so forth (Rec. pp. 10, 15), and not money borrowed at 18% interest (Rec. p. 15) as the Myers well knew. The normal rate of interest was 5½% and 6% at that time (Rec. p. 15).

Under such circumstances the Bank brought in the State Court *an action of tort* to recover the

damage it had suffered by reason of the fraud and deceit (Rec. p. 27). The defendants denied the fraud, and in addition set up that the debt was discharged by reason of the composition in bankruptcy and, further, that the Bank had objected to the confirmation of the composition on the ground of fraud, and that the confirmation of the composition in the Bankruptcy Court was *res adjudicata* on the question of fraud (Rec. p. 29).

It should be noted that the Bank brought a *tort* action to recover damages by reason of the fraud perpetrated upon it and *not* an action in *contract* to recover on the notes.

The petitioners urge that the Massachusetts Court has not given full faith and credit to a judgment of the United States Courts in that the State Court failed to hold that this obligation for which suit was brought was barred by the confirmation of the composition.

This contention is nothing more than the determination of the question of what claims are barred by a discharge in bankruptcy.

I.

The right of the bank to maintain an action for deceit and misrepresentations was not a provable claim in bankruptcy and hence was not discharged by the confirmation of the composition.

At the time the International Trust Company made the advances it had two separate and distinct causes of action: (a) an action of contract founded upon the contractual obligations created

by the notes, and (b) an action of tort founded upon the deceit of the Myers in inducing the bank to pay money upon misrepresentations intentionally made.

The Bankruptcy Act (U. S. Comp. Stats., Sec. 9598), recognizes these two distinct causes of action and discharges the debtor from his liability on the contract and denies him the discharge from liability for deceit.

Section 14c provides that the confirmation of a composition discharges debts other than those not affected by a discharge.

Section 14b requires the discharge of the debtor unless he has "* * * (3) obtained money or property on credit upon a materially false statement in writing, made by him to any person or his representative for the purpose of obtaining credit from such person."

Section 17, as amended by Act February 5, 1903, c. 487, sec. 5, and Act March 2, 1917, c. 153, provides that a discharge releases a bankrupt from his provable debts except such as "* * * (2) are liabilities for obtaining property by false pretenses or false representations * * *"

Section 63 defines "provable debts," and the definition does not include actions of tort for false representations.

The meaning of the word "false" as used in these sections of the Bankruptcy Act is that the statement must be not only untrue, but also untrue with an intention to deceive.

No question is raised as to the instruction to the jury by the Trial Court defining the word "false" (Rec. p. 21. Requests 3, 4, and 5. Charge Rec. pp. 22, 24, 25.)

The Bank proved its claim on the notes in the Bankruptcy proceedings.

It did *not* prove its right to recover in tort for deceit and misrepresentation.

Such a claim is not provable.

In *Schall* v. *Camors,* 251 U. S., 239, commercial paper was sold by a partnership by means of false representations. Both the partnership and individual partners were petitioned into bankruptcy. The creditor proved his claim on the notes against the partnership estate. He also proved against the individual estates of the partners a claim for damages suffered by reason of the misrepresentation. Upon the petition of the trustee in bankruptcy the claim against the individual estates was rejected on the ground that this claim was one in tort and hence was not provable.

In *Talcott* v. *Friend,* 179 Fed., 676, (C. C. A. 7th), affirmed 228 U. S., 27, the debtor obtained credit for merchandise upon a statement which was false. It was held that the creditor could prove his claim in contract in the bankruptcy proceedings and also maintain an action after the bankruptcy proceedings to recover damages for the injury suffered by reason of the misrepresentation. On page 680 the Court said:

> "If a claimant in bankruptcy had in truth no contract on which to base his claim; if he did not in fact sell and deliver, nor intend to sell and deliver, the goods to the bankrupt; if the bankrupt obtained possession of the goods by theft or force or trick; and if the claimant proved the theft or force or trick to support the legal fiction of a contract—then it might properly be ruled that the injured party should not be permitted thereafter to prove the same theft or force or trick to support an action in tort. That is, a waiver of the tort would be held to be the basis

> of the fiction that there was a contract. But whenever there is in truth a contract, no waiver of a tort that is consistent with a contract's existence is necessary to the contract enforcement.
>
> "We conclude, therefore, that the prosecution of the claim in bankruptcy was not a bar to this action for deceit."

And again, at page 682:

> "The cause of action for deceit, not having been reduced to 'a fixed liability as evidenced by a judgment,' was not a 'provable debt' (section 63 of the act; 1 Remington on Bankruptcy, pp. 376, 424) and therefore was not extinguished by the discharge."

Speaking of the principle urged by the respondent in the foot note to the report of this decision in 43 L. R. A. N. S. 649, it is said:

> "The questions stated may now be regarded as conclusively answered by the Supreme Court of the United States."

The fact that the Trust Company proved its claim on the contracts, the notes, does not affect this right to maintain this action of fraud.

Standard Sewing Machine Company v. *Kattell*, 132 N. Y. App. Div. 539;
In re Menzin, 238 Fed., 773, (C. C. A. 2nd);
Zimmern v. *Blount*, 238 Fed., 740 (C. C. A. 5th);
In re Groodzinsky, 248 Fed., 753 (D. C. Ga.);
Forsyth v. *Vehmeyer*, 177 U. S. 177;
Crawford v. *Burke*, 195 U. S. 176, 178.

In *Frey* v. *Torrey,* 70 N. Y., App. Div. 166, aff'd in 175 N. Y. 501, the fact that the plaintiff had proved his claim in bankruptcy on a contract was held to be no bar to maintaining an action in the State Court for deceit.

The debt is expressly excepted from the operation of the discharge by §17 (2).

The present case is not one where the plaintiff may treat his cause of action as one in assumpsit, electing whether he will treat the fraud as a quasi-contract and waive the fraud, but it is one where there are two separate and distinct rights which give rise to separate and distinct causes of action.

Crawford v. *Burke,* 195 U. S., 176, has no application to the present case. It is a decision on the Bankruptcy Act before the Amendments of 1903. It holds merely that the Act as it then existed excepts from the operation of the discharge only judgments founded on a fraud and not claims based on fraud. The Act has since been amended to enlarge the scope of debts not discharged. Further, the cause of action was based on conversion of stock, so that the creditor had a right to elect whether he would sue in contract or in tort.

Tindle v. *Birkett,* 205 U. S., 183, is also a judicial determination of the statute before amendment, and the Court expressly states that *Crawford* v. *Burke* governs that decision.

Kreitlein v. *Ferger,* 238 U. S., 21, is no authority that the claim now before the Court was a provable claim. At page 27 it is said:

> "On the part of Ferger it is said that this suit is on a judgment for $300 rendered in an action not 'founded upon a contract express or implied—and it seems to have been claimed that the judgment was not a provable debt

> within the meaning of Section 63 (a. 4) of the Bankruptcy Act. But the special finding of the jury in that case showed that in purchasing the flour Kreitlein *had not made any fraudulent concealment or misrepresentation as to his financial condition.* Besides the judgment was a provable debt even though rendered in a suit where the creditor had elected to bring an action in trover, as for a fraudulent conversion instead of assumpsit for a balance due on open account. *Crawford* v. *Burke,* 195 U. S. 176, 193." (Italics are counsel's.)

The petitioners fail to recognize the fact that the Bank has these separate rights and argue that there was but one claim which was proved and dividends in composition received on it. Hence the argument is that under Sec. 17 (2) the claim was barred unless the petitioners' statements were false, and the judgment of the Bankruptcy Court was that it was not false. As Sec. 17 (2) applies only to "provable" debts and Sec. 63 does not in its definitions of "provable debts" include a debt arising by reason of false representations, the decision of the Bankruptcy Court on the statement has no bearing on whether the claim was provable and hence barred by the discharge.

II.

The decision of the United States District Court in bankruptcy in confirming the composition was not *res judicata* upon the question of fraud.

The Trial Court properly excluded the record in the bankruptcy proceedings.

In the course of the trial it appeared that shortly after the making of the loans in question the Myers went into bankruptcy and in the course of the proceedings offered the composition, which was confirmed, and the Bank proved the notes and received its payment thereon in this composition.

The Myers offered in evidence the record in the proceedings in the United States District Court for the district of Massachusetts in the case of *In re Samuel A. Myers et al, Bankrupts,* including the record on appeal to the Circuit Court of Appeals for the First Circuit and the mandate of the Circuit Court of Appeals sustaining the District Court in confirming the composition.

This record, the petitioners contend, constitute an estoppel against the bank, which prevents the bank from maintaining its action in the state court to recover the damages suffered by reason of the false statement.

Section 12-d of the Bankruptcy Act requires the confirmation of a composition, provided the alleged bankrupt has not been guilty of any acts which will bar a discharge, and Section 14-b-3 refuses the discharge if the bankrupt has obtained money or property on credit upon a materially

false statement in writing made to "any person or his representative" for the purpose of obtaining credit.

Any creditor may object to the confirmation of the composition irrespective of whether the false statement was made to him or to another creditor.

In re Miller, 192 Fed. 730, 733 (D. C., N. D., Iowa);
Talcott v. *Friend,* 179 Fed., 676, 681 (C. C. A. 7th);
In re Kretz, 212 Fed., 784, 786 (D. C., W. D., Wash.)

The jury has found after proper instruction from the trial court that the statement was intentionally false within the definition of the Federal cases construing the Bankruptcy Act (Rec. pp. 24, 25, 27).

The petitioners have argued that the Bank had the option of remaining silent in the Bankruptcy Court as to the fraud and later avoiding the effect of the discharge by showing that the petitioners' liability was for obtaining property by false representations, or of trying out the issue of fraud in objecting to the discharge in the Bankruptcy Court.

This argument is clearly unsound and results from confusing the nature of the Bank's rights. It assumes that the Bank had only one claim and that the assertion of that claim in the Bankruptcy Court eliminated the right to maintain an action for fraud after the granting of the discharge. Further, it assumes that the Bank had

the right to avoid the discharge in a subsequent suit on the notes, on the ground that it was a provable debt and a liability for obtaining property by false pretenses under §17 (2). The Bank, as stated before, had two rights—contract on the notes and tort for fraud. The first was provable. The second was not. If the Bank had merely the one right which allowed it to go into the Bankruptcy Court, it had a provable claim which was followed by the discharge, but under the statute the Bankruptcy Court never had and could not have before it the claim founded on the tort.

Further, the damages in the tort action could not be determined until the loss suffered by reason of the tort was fixed by the dividend received in the Bankruptcy proceedings.

There was no such election and waiver as the petitioners argue.

> *Friend* v. *Talcott*, 228 U. S., 27, at pp. 37-38.

Neither is it a case of one wrong with an election of remedies.

The case of *United States* v. *Oregon Lumber Co.*, 260 U. S. 290 (Advance Sheets) shows clearly the distinction between the present case and one where an election bars a second suit. In the Oregon Lumber Company case the sale of lands was voidable and the Government had suffered one wrong, namely, being induced by fraud to convey lands. It could either disaffirm the sale and recover the lands or seek damages for the fraud, that is, disavow the contract or affirm it. After attempting to disavow the contract it could not then affirm it.

In the present case the proving of the notes was the affirmation of the contract and the bring-

ing of suit in tort was a second affirmation and seeking damages for the injury caused by reason of the fraud. The right to object to the discharge arose out of the right to prove the notes and was entirely incidental thereto.

Nor can the doctrine of estoppel have any application.

The parties in the Bankruptcy proceeding are not the same as the parties in this suit. It was the bankrupt estate against the bankrupt and not one individual creditor against the bankrupt.

In *Troxell* v. *D., L. & W. R. R.*, 227 U. S. 434, 443, a suit by a widow personally was held to be a suit entirely different from one brought by the widow as administratrix.

Bates v. *Bodie*, 245 U. S. 520, has no application. The parties were the same, the issue of divorce was the same. The determination of alimony was based on the total value of the husband's property both in Nebraska and Arkansas. Hence the issue of the value of the property in Nebraska had been raised and determined.

Postal Tel. Cable Co. v. *Newport*, 247 U. S. 464, holds there was no estoppel because the parties were not the same. The Company was not a party or privy to the former suit.

The question at issue is not the same. The sole question in the bankruptcy proceedings was whether the debtor should be dicharged from his provable debts, not whether any particular debt was discharged. In the present case the sole question is whether the Meyers had obtained money or credit from the plaintiff upon an intentionally false statement, and if they had, this claim was not a provable debt and was not barred by the discharge. The cases cited above hold that it was not a provable debt.

The Bankruptcy Act itself brings the two rights out clearly. Section 14-b-3 requires that the false statement shall be in writing, but Section 17-a provides that a discharge shall not release the bankrupt from liability for obtaining money by false representations even though the statement is not in writing. This shows clearly that the statute contemplates that certain acts shall constitute a bar to the discharge, thus continuing the liability of the bankrupt for provable debts, but that certain other acts shall prevent the release of the bankrupt from liability arising from them, although such acts alone are not a bar to the discharge.

Friend v. *Talcott*, 228 U. S. 27, is decisive. The facts are almost identical with the facts in the present case. A partnership, consisting of Friend and some others, was adjudicated bankrupt; the bankrupts offered a composition; Talcott, a creditor whose claim in contract had been allowed, objected to the composition on the ground that the bankrupts had obtained from him credit by means of false reports as to the financial conditions of the firm. The objections were overruled on the ground that the statement was made to a commercial agency, and the composition was confirmed. Later Talcott brought suit to recover the damages suffered by reason of the false statement, relying on the same deceit set out in his objections to the composition and the damages sought were the difference between the contract price and the amount which Talcott had received in the composition. The defendants in addition to the general issue set up *res judicata*.

The Court held that the action could be maintained and that the confirmation of the composi-

tion was not *res judicata*. At page 40 the Court said:

> "While the considerations just stated dispose of the question of waiver and election, they virtually also serve to indicate the error which underlies the contention as to *res judicata*, that is, a confusion of thought arising from treating things which are different as one and the same. To constitute *res judicata*, it is elementary that there must be identity of cause between the two cases. In view of the text of the bankrupt law, the distinction which it makes between the general discharge and the right of a particular creditor to be exempt from the operation of such discharge it needs but statement to demonstrate the difference of cause which necessarily obtains between determining on the one hand in favor of the bankrupt whether he is entitled to a general discharge and of deciding on the other, as between a particular creditor and the bankrupt, whether the claim of that creditor is of such a character as to be exempt from the operation of a discharge. Nothing could more clearly emphasize the distinction which exists between the two subjects—that is, the granting of a general discharge and the question after it is granted whether a particular debt is exempted by law from its operation—than does the provision of the statute (Sec. 14c, 30 Stat. 550) authorizing a general discharge as the result of an approval of a composition, since it expressly reserves from the operation of such discharge of the bankrupt from his debts, 'those not affected by a discharge.' * * *
>
> "Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford

no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case. If, on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results that in no view of the case is there merit in the contention as to *res judicata*. The contentions urged in many forms based upon the recitals in the order of confirmation of the composition made conformably to the statute as to the absence of fraud or other wrongdoing, etc., is but a reiteration of the contention as to *res judicata* which we have shown to be without foundation."

See *Talcott* v. *Friend*, 179 Fed. 676, 681.

The *Talcott* case is not distinguishable. The fact that the representation was made through a commercial agency, and that the Bankruptcy Court in confirming the discharge did not pass on the question of whether Friend had obtained credit by misrepresentation, does not make any difference. Both the Circuit Court of Appeals and the Supreme Court considered this argument and rejected it.

Even conceding the defendants' argument that the case of *Friend* v. *Talcott* might have been decided on a narrow ground, the fact remains that the Court did establish exactly the principles for which the respondent contends in this case, and the respondent submits that the Trial Court ruled properly in following this decision of this Court.

The Circuit Court of Appeals for the Second Circuit has followed the *Talcott* case.

In re Menzin, 238 Fed. 773 (C. C. A. 2nd). In that case there was an order by the District Court staying petitioners from proceeding under their specifications filed in opposition to the bankrupts' discharge, unless they discontinued their action brought in the State Court. The debtor was adjudicated bankrupt and the creditor proved his claim for goods bought. The creditor then brought suit in the State Court to recover damages by reason of the bankrupt having obtained the goods in question on credit by fraudulent representations. The Court held that such a suit in the State Court could be maintained in spite of the fact that a claim in contract had been allowed in the bankruptcy proceeding.

At page 774 the Court said:

> "(3) We are quite clear that the petitioners may proceed with their suit in the state court in tort notwithstanding that they first proved their claims in bankruptcy on contract. In *Friend* v. *Talcott,* 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, the Supreme Court held that a creditor who had unsuccessfully opposed a composition and discharge in bankruptcy, and who had accepted his dividend thereunder, might still sue for the balance of his claim in the state court, on the ground that the indebtedness was fraudulently contracted, and therefore excepted by the act from the operation of the discharge."

The rule of the *Talcott* case which the Bank urges is the same as already given by the Federal Courts.

In *Pell* v. *McCabe,* 256 Fed. 512 (C. C. A. 2d), at page 517, it is said:

"*Friend* v. *Talcott*, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718. In the case cited the Court holds that a creditor who had unsuccessfully opposed a composition and a discharge in bankruptcy on the ground of fraud in creating the debt, and accepted a dividend, and who then sued for the balance on the ground that the debt was excepted from the discharge, had not waived his right to sue on the tort by accepting the dividend; and the Court also held that the granting of the discharge was not *res judicata* of the claim for the balance of the debt."

See also *in re Groodzinsky*, 248 Fed. 753, 754, 755;
Corpus, Juris Bankruptcy, p. 400;
Collier Bankruptcy, 1921 Ed. p. 406;
Remington Bankruptcy, 2nd Ed., p. 2493, § 2750¾;
Foster Federal Practice, 5th Ed., Vol. II, pp. 2254, 2256.

III.

There was ample evidence from which the jury was entitled to find that the Myers obtained money with intention to deceive by means of a false statement.

The petitioners do not claim that there was error in the instructions which were given to the jury on this question or that the Trial Court or that the Supreme Judicial Court did not follow the United States Courts in the definition of the fraud which the Bank must prove in order to

recover. (Rec. pp. 22, 24-25. Requests for Instructions No. 3, 4, 5 and 6, at Rec. p. 25.)

It was claimed by the Meyers that the statement was not false.

The Bank alleged that it had been deceived by reason of the Myers failing to give information as to a material change in the method of doing business; by the Myers concealing the fact that the Myers had assigned accounts receivable; by the Myers giving a statement which was in itself false, not only by its failure to set out a true, accurate and complete statement of their financial condition, but also by having absolutely false entries in the statement itself.

The Trial Court held that there was sufficient evidence upon which the jury might find that the statement was false. The Supreme Judicial Court was satisfied that the Trial Court was correct (Rec. p. 45).

The Bank in its letter of March 22, 1916 (Exh. 9) asked the Myers "to send us on the enclosed form statement of your financial condition". The form enclosed was not used by the Myers, but instead Exhibit 6 was sent.

The statement, Exhibit 6, was false in four particulars.

(A) It stated that the bankrupts owned accounts receivable for merchandise sold of $58,426.06, which in fact they did not own any such sum of such accounts. Samuel Myers testified (Rec. p. 10):

> "Accounts receivable meant accounts due us from customers for garments and clothing which we had sold and shipped to them."

Glass, the bookkeeper in charge of the books, testified (Rec. p. 14):

> "At the time the statement of March 27th, 1916, Exhibit 6, was made, I think something like $27,000 of accounts receivable had been assigned, as of January 1, 1916. The books show that on March 27th, I should say we had assigned accounts to the extent of $46,441.13".

Samuel Myers testified (Rec. p. 9):

> "It (Item of accounts receivable) also contained all the accounts which we had assigned. It included the notes which we had assigned to the Investment Trust. The general practice in dealing with this Investment Trust was that we ship merchandise, invoice it, take certain accounts, and send them a duplicate invoice, and they would loan us 80% on that invoice."

(B) The statement included in the sum owed for merchandise, as accounts payable, $27,000. which was in fact owed for borrowed money at more than 18% interest.

Myers testified (Rec. p. 10):

> "Accounts payable meant accounts owed by us for merchandise which we had bought."

Glass testified (Rec. p. 15) that the accounts payable meant money owed for services, merchandise, and that the generally accepted term "accounts payable" could not be interpreted according to the ethics of accountants as including money which they had borrowed. He further testified (Rec. p. 15):

> "The money received from these assigned accounts was not an obligation to pay for merchandise."

The fact was that this item included the money which the Myers owed the Commercial Investment Trust for money advanced by that Trust upon which they were paying more than 18% interest, although, as Myers testified (Rec. p. 10):

> "The item, notes payable, in the statement Exhibit 6 represents money borrowed whether we gave a note or not."

(C) The statement set out that the loans were $59,713.12 while in fact they were $86,613.12; $26,900 having been omitted.

The item for notes payable represented that the only money borrowed was included in that item. In short, the statement represented that on January 1, 1916, the Myers owned $27,000 of quick assets and on the 27th of March, 1916, $46,441.13, while as a matter of fact they did not. It concealed entirely the fact that the Myers had borrowed $26,900 on which they were paying more than 18% interest.

(D) The statement was false in concealing the assignment of accounts and the material change in the method of conducting the business.

The Myers had been dealing with the International Trust Company for fifteen years or more and had been discounting notes and borrowing money from time to time. They had given a financial statement each year (Rec. p. 7). In 1903 they were asked if any accounts were assigned (Rec. p. 10). When they made this statement, Exhibit 6, they were asked in the form which came with the letter, Exhibit 9, "Are all bad or doubtful assets included in above statement? Are any of above assets pledged or liabilities secured by collateral, judgment notes or otherwise?" (Rec. p. 20.) In 1903 they answered

that they had not assigned accounts (Rec. p. 10) and in 1916, by their failure to use the form sent by the Bank they represented to the Bank that the answer to both of these questions was in the negative. They did not disclose to the Bank the complete change in the method of financing their business. Further, Myers testified (Rec. p. 9):

> "When I gave the notes, Exhibit 7, to the Trust Company, I did not at any time tell them of this agreement with the Commercial Investment Trust, or that we were putting up our accounts receivable for money loaned to us."

In other words, they concealed the fact that the only quick assets which appeared on the statement had been turned over to the Commercial Investment Trust and were not available to creditors.

As stated by Braley, J., in the opinion in this case (Rec. p. 45):

> "The concealment of material facts with intention to mislead and defraud stands no better than the affirmation of a material misrepresentation. We refer only to a few cases sustaining what has been said on this branch of the case. *Safford* v. *Grout*, 130 Mass. 20; *Stewart* v. *Joyce*, 201 Mass. 301, 310, 311 and cases there cited. *Robinson* v. *Richards*, 209 Mass. 295; *Harvey* v. *Squire*, 217 Mass. 411, 416; *Warfield* v. *Wood*, 14 Wend. 126; *Stubly* v. *Peachboard*, 68 Mich. 49."

Hough, J., in *In re Brener*, 166 Fed. 930, at 931, when dealing with a statement from which borrowings had been omitted said:

> "The suppression of all indebtedness for borrowed money is, I think a particularly flagrant form of material falsity, first because it is a suppression of truth especially calculated to prevent further inquiry, and second, because its omission is the omission

> of something particularly and always present in the mind of the debtor. It cannot be inadvertent. It must be deliberate."

The representations were material. Jewett, the officer of the Bank who passed upon the question of loans to be made to the Myers, testified:

> "These (Exhibits 1 to 6) are the statements I used in giving credit to the Myers. * * * Prior to October, 1916, I did not have any conversation with them (Myers) as to the discounting of notes. When I discounted the notes in question, I relied upon the signed statement on file to determine whether credit should be given to the Myers. I did not limit it to one statement but relied on those throughout a number of years. When I passed on the statements I relied on the accounts receivable as having the ordinary and usual meaning in business (Rec. p. 11).
>
> * * *At the time the notes were presented I had no information that the Myers had assigned their accounts receivable to the Commercial Investment Trust. The Myers did not disclose in any form any information that they had assigned their accounts receivable. The statement in Exhibit 6 did not show that certain accounts receivable had been assigned" (Rec. p. 12).

He further testified that he did not know the Myers were paying at the rate of 16% to 18% for money borrowed, otherwise

> "We would not have discounted those notes. I have had experience in discounting and banking, and my experience has been that when persons pay 16% to 18% for money they are in a bad condition" (Rec. p. 12)

He continued that if he had known he would not have advanced a dollar (Rec. p. 12).

In July, 1915, the Myers had made this agreement with the Commercial Investment Trust and proceeded to assign accounts from time to time, always in increasing amounts.

There can be no question that the statement was false, not only as set forth above but also in the amount of the "net capital" of $83,510.33, for with such a capital it would have been entirely unnecessary to have inaugurated the system of assigning the accounts. Further, it completely failed to set out a change in the method of doing business and the mere fact of it being delivered to the Trust Company in silence led the Trust Company to believe that the Myers were carrying on their business in the old reliable and honest way.

The Myers urge that there was no evidence of intention to deceive.

The Myers intended to borrow money on this false statement and did borrow $20,000. on it from the International Trust Company.

Samuel Myers testified:

> "I intended that the International Trust Company rely on it (the statement) as being accurate and true. I gave it (the statement) to them so that they would know our condition" (Rec. p. 11).

Glass, the bookkeeper, testified:

> "When this statement, Exhibit 6, was made, we intended that whoever saw it should rely on it, and that they should take it just as it was made out" (Rec. p. 18).

Samuel Myers knew that these statements were given to the Bank to enable the Bank to find out what their financial condition was (Rec. p. 8). The form used in 1903 and that sent with the letter of March 27, 1916, contained direct ques-

tions as to whether the assets were pledged or accounts assigned. He knew that the form included in Exhibit 9 contained a similar question. He knew the meaning of accounts receivable and he knew that the item of accounts receivable in his statement (Exhibit 6) included all which he had assigned (Rec. p. 9). He testified how he conducted his business with the Commercial Investment Trust. He knew the terms of that contract including the fact that he was paying 18% interest. He knew of the various meanings of the terms in the statement and of the false entries. He knew of the change in his method of doing business. With all this knowledge he remained silent and permitted the Trust Company to lend him money.

Nor can he shelter behind the testimony of his bookkeeper, Glass. Glass knew the terms of the Commercial Investment Trust agreement (Rec. p. 14); he knew the meaning of the accounts payable and accounts receivable; he knew that $27,000 worth of accounts were assigned, and that the amount of these assigned accounts increased during the year 1916 to over $100,000 (Rec. pp. 14 and 18); he knew that the item accounts payable did not disclose interest of 18% (Rec. p. 15). His testimony can leave no question that he was thoroughly familiar with the entire situation and with that form before him prepared the statement to be sent to the International Trust Company under the direction of Samuel Myers.

Any person charged with intentional fraud will stoutly deny that he ever intended to deceive, and the intention can be found only from what happened. Ample circumstances were put in evidence to clearly establish the deliberate intention to deceive. It is not a question of the disbelief of the

jury creating affirmative evidence. The evidence was there.

The Court will hesitate to review the findings of a jury which saw the witnesses and heard the manner in which these witnesses testified, or to set aside the rulings of the Trial Justice on questions of fact. The Supreme Judicial Court found in the case ample evidence from which the jury could find intention to deceive within the definition given by the Trial Court.

IV.

The trial court committed no errors in admitting evidence.

The petitioners urge that the Trial Court committed error in admitting evidence which the plaintiff offered.

The Supreme Judicial Court, however, has found no error and the Bank does not intend to burden the Court by an extensive argument of these questions.

(a) The Bank offered statements submitted by the defendants from January 1, 1910, to February 4, 1914 (Exhs. 1 to 5) and the petitioners objected (Rec. pp. 7, 8).

These statements were offered as showing a course of dealing prior to 1916, and as a part of a continuing representation down to the time when the false statement, Exhibit 6, was submitted.

The offer was also preliminary to examination of the Vice President of the Bank who testified

that in determining whether the loans of $20,000 from October, 1916, to December, 1916, should be made, he relied on all previous statements (Rec. p. 11). Further, the statements were admissible as part of the method by which the petitioners had concealed and suppressed material facts in respect to Exhibit 6.

The change by the petitioners in their method of financing their business was a material fact which could be proved only by evidence of what had been done before, namely, Exhibits 1 to 5.

(b) Henry L. Jewett, the officer at the Bank, who passed on the financial condition of the Myers, was asked whether or not the Myers had informed him that they were paying 16 to 18 per cent interest for money (Rec. p. 12). The petitioners objected to the question.

It was material to show that the Myers had not informed the Bank of the rate of interest or of the assignment of the accounts and consequently the financial condition. It was also material that the Bank had no knowledge of the falsity of the statement when it advanced the money on the strength of the statement. The question is clearly one to establish the knowledge which the Bank had.

(c) The petitioners also objected to Jewett being asked whether he would have advanced the money if he had known that the petitioners were paying 16 to 18 per cent interest, or that an agreement like the one in question had been made, and further, they objected to the question of whether Jewett had been misled in his opinion of the financial condition, by reason of the failure of the statement Exhibit 6, to disclose the facts relating to the assignment (Rec. pp. 12 and 13).

The operation of Jewett's mind was for the consideration of the jury and on that subject he was the only competent witness.

Toole v. *Crafts*, 193 Mass., 110, 112;
Anaster v. *Koliopoulos*, 222 Mass., 267, and cases therein cited.
Cyc., Vol. 20, p. 117.

(d) The petitioners objected to the admission of the blank form at the close of the Bank's case.

The letter of March 22, 1916, Exhibit 9, referred to a form enclosed. The form was not produced when the letter was admitted. The Bank objected to the admission of the letter without the production of the form, and upon the Court suggesting that the Bank produce the one in use at the date of the letter, and that that one be put in evidence, the objection was withdrawn. The petitioners acquiesced in this suggestion and had the letter marked as an exhibit (Rec. p. 10).

At the close of the Bank's case the form in use in March, 1916, was offered in evidence and admitted over the petitioners' objection (Rec. p. 19).

It is respectfully submitted that the petitioners, by acquiescing in the suggestion of the Court, induced the Bank to change its position and withdraw its objection to the admission of Exhibit 9. They should not now be heard in repudiation of their action.

(e) The petitioners objected to the allowance of interest by the jury from the date of the writ (Rec. p. 26).

There was no error in permitting the jury to compute such interest.

Cochran v. *Boston*, 211 Mass., 171, 172.
New York Bank Note Co. v. *Kidder Press Mfg. Co.*, 192 Mass., 391, 406.
Peabody v. *New York, New Haven & Hartford*, 187 Mass., 489.
Frazer v. *Bigelow Carpet Co.*, 141 Mass., 126.

Respectfully submitted,

JOHN R. LAZENBY,
Attorney for International Trust Co.

Supplementary.

The respondent not having been served with a copy of the petitioners brief until September 21st, was not aware of the points upon which the petitioners intended to rely. As a consequence the third and fourth points in the respondent's brief are superfluous.

In the view of the respondent the finding of the Referee as to the truth or falsity of this statement is immaterial, as that finding creates no estoppel and is not *res judicata* on the question of falsity, but in view of the persistency with which the petitioners claim that the Referee found that the statement was not false, the respondent begs leave to refer the Court to the exact finding of the Referee at page 58; "When the financial statement showing the condition of the bankrupts above referred to was taken from their books it was a true statement and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time, and kept by an experienced, competent bookkeeper * * *

"I therefore find and so report that according to the method of bookeeping employed by the alleged bankrupts the amount of the accounts receivable January 1, 1916, was correctly set forth in said statement."

This is merely a finding that the statement was a correct transcript from the books—it is not a finding that the statement set forth the true and accurate financial condition of the bankrupts upon which one could rely in lending them money.

It is respectfully submitted that the books were false, and that a statement containing the same falsity as the books does not get purged of the misrepresentation as to the financial condition of the bankrupts merely because it is a copy of such false books.

The Referee made no finding whatever as to the concealment of the making of the agreement with the Commercial Trust or of the fact that accounts receivable had been assigned.

Supreme Court of the United States

No.....

OCTOBER TERM, 1922

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,
Petitioners,

v.

INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

EDWARD F. MCCLENNEN,
For the Petitioners.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922. No.

SAMUEL A. MYERS AND HARRY MYERS,
CO-PARTNERS AS S. A. & H. MYERS,
Petitioners,

v.

INTERNATIONAL TRUST COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts are succinctly stated in the petition which this brief accompanies.

GROUNDS FOR THE WRIT.

The petitioners have a discharge in bankruptcy under the Bankruptcy Act of the United States and a judgment of a Court of the United States, rendered in a suit between the petitioners and the respondent, in which the issue was necessarily tried, that the petitioners have not made a false statement. The petitioners have the rights and the immunities under the Constitution and Statutes of the United States, which this discharge and this judgment give them. Of a similar question of estoppel by judgment of a United States Court, this Court in *Radford* v. *Myers*, 231 U. S. 725, 730, said:

> "Whether such effect was given as the former judgment required, presents a Federal question for determination. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 233. To determine this issue we examine the judgment in the former case, the pleadings filed and the issues made, and, if necessary, to elucidate the matters decided, the opinion of the court which rendered the judgment. *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, supra, 234, and previous cases in this court therein cited."

Accordingly, in *Radford* v. *Myers* this Court did not dismiss the Writ of Error, but on the contrary considered the merits of the question and affirmed the judgment of the State Court on its merits.

In *Crawford* v. *Burke*, 195 U. S. 176, 186, 194, this Court decided that whether the Supreme Court of the State had given proper effect to a discharge in bankruptcy in view of the circumstances under which the debt had been contracted, was a Federal question, and reversed the judgment of the State Court and gave judgment that the discharge was a bar.

In *Crescent City Livestock Co.* v. *Butchers' Union Slaughterhouse Co.*, 120 U. S. 141, this Court held that the effect, of a decree of the Circuit Court of the United States granting a preliminary injunction to the Crescent Company, as probable cause for the injunction suit (notwithstanding the fact that the suit was held finally to be without merit), was a question arising under the Constitution and Laws of the United States (p. 146), and that the State Court in the subsequent suit at bar by the Butchers' Company against the Crescent Company for malicious prosecution in bringing the suit in the Circuit Court to obtain the injunction, had, by failing to give it that effect, deprived the Crescent Company of a privilege or immunity under the Constitution or Laws of the United States (pp. 146, 156, 158.)

This establishes that the incidental effect as well as the direct effect of a decision of a Court of the United States presents a federal question, and that the right of the prevailing party in that decision is a right or immunity under the Constitution and Statutes of the United States.

Friend v. *Talcott*, 228 U. S. 27, was deemed by this Court a proper case for the allowance of a Writ of Certiorari where it was wrongly claimed that the discharge in bankruptcy itself, regardless of the issue tried, was *res judicata* that the bankrupt had not made a false statement. The case at bar differs from *Friend* v. *Talcott* as hereinafter discussed, but as to the question of jurisdiction, it differs from it only in the greater public importance of the question now involved.

It is manifestly of public importance to know whether a discharge in bankruptcy and a decision of a United States Court on a particular question tried out between parties as a preliminary to granting the discharge, are binding upon the same parties on the same question in a suit in a State Court, subsequently brought. The decision of a State Court that such a decision of the United States Court is not binding, manifestly tends to bring the decision of the United States Court into contempt for inefficacy. It is of public importance that everyone should know that when he has successfully tried an issue in a Court of the United States, he has acquired a right to have effect given to that decision, when pertinent in any other Court.

That right the Massachusetts Court has denied the petitioners, as more fully appears in the discussion of the merits of the question hereinafter.

THE UNITED STATES HAD DECIDED, AFTER A TRIAL OF THE PARTICULAR ISSUE BETWEEN THE SAME PARTIES IN THE BANKRUPTCY COURT, THAT THE PETITIONERS' REPRESENTATIONS WERE NOT FALSE OR MADE WITH AN INTENTION TO DECEIVE; AND THAT DECISION CREATED AN ESTOPPEL IN THE PETITIONERS' FAVOR AGAINST THE TRIAL OF THAT ISSUE IN THE CASE AT BAR.

The petitioners with the consent of a majority of their creditors applied for a confirmation of a composition in the Bankruptcy Court and the consequent discharge in bankruptcy. This application would have been granted if no objection had been made. The respondent could have remained silent and could have brought suit subsequently against the petitioners in which the respondent could have avoided the discharge in bankruptcy as a bar if the respondent could show that the petitioners' liability to the respondent was for obtaining property by false pretences or false representations. The respondent chose not to do this, but on the contrary, to try out the issue in the Bankruptcy Court. This proceeding on the respondent's part, if it had been successful, would have been a bar to the confirmation of the composition.

The Bankruptcy Act, Sec. 14 (c), U. S. Comp. Stats., Sec. 9598, provides that "the confirmation of a composition shall discharge the bankrupt from all his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Sec. 17 (2), Comp. Stats., Sec. 9601, provides that "a discharge in bankruptcy shall release a bankrupt from all his provable debts except such as . . . (2) are liabilities for obtaining property by false pretences or false representations. . . ."

Sec. 14(b) provides that "the judge shall hear the application for a discharge. . . . and discharge the applicant, unless he has. . . . (3) obtained money or property on credit, upon a materially false statement in writing made by him to any person or his representative for the purpose of obtaining credit from such person. . . ."

It will be noted that in order to prevent a discharge, the false representation must have been in writing, and must have been made to the person or his representative from whom the credit is obtained, but that the discharge, when granted, may be avoided by the creditor if there was a false representation although not in writing and not made directly to the creditor or his representative. This makes a possibility that the issues on a trial of objections to a discharge may differ from the issues on a trial to avoid the discharge; but there is no difference with respect to falsity, because if the statement was in writing and was made directly to the creditor, then if it was false it not only avoids a discharge under Sec. 17, but it also prevents a discharge (Sec. 14.)

In the case at bar, and in the case in the Bankruptcy Court, the only issue tried (and that issue was tried), was whether the statement was false in the sense in which that word is used in the Bankruptcy Act. It was undisputed in both Courts, that the statement had been made, that it was in writing, that it was made directly to the respondent, that it was material, and that credit was obtained. The Bankruptcy Court found all the facts needful for refusing to confirm the composition, except the fact that the statement was false. The judgment of that Court — both of the District Court and of the Circuit Court of Appeals — between these same parties was that the statement was not false. There is presented the unseemingliness that there are outstanding to-day, after trials on identical evidence between the same parties, two judgments, — the first, that of the United States Court, that the petitioners' statement was not false, and the second, that of the State Court that the petitioners' statement was false.

As applied to the present case, the language of the two sections of the Bankruptcy Act is identical. "Materially false statement," in Section 14 does not differ from "false pretences" or "false representations" in Section 17.

The respondent's claim relied on in the State Court was actually proved and dividends in composition were received upon it.

It was a provable claim.

Schall v. *Camors*, 250 Fed. 6, 251 U. S. 239, 251.
Crawford v. *Burke*, 195 U. S. 176, 187–193.
Tindle v. *Birkett*, 205 U. S. 183.
Friend v. *Talcott*, 228 U. S. 27, 38.
Kreitlein v. *Ferger*, 238 U. S. 21, 27.

Under Section 17 (2) the claim was barred unless the petitioners' statement was false. The judgment of the Bankruptcy Court was that it was not false.

"The general principle, applied in numerous decisions of this Court, and definitely accepted in *Southern Pacific R.R. Co.* v. *United States*, 168 U. S. 1, 48–49, is, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties *sui juris* is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for the same or a different cause of action. As was declared by Mr. Justice Harlan, speaking for the court in the case cited (p. 49): 'This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.'"

Oklahoma v. *Texas*, 256 U. S. 70, 85.

"Undoubtedly, as in all other judicial proceedings, an adjudication refusing a discharge in bankruptcy, finally determines, for all time and in all courts, as between those parties or privies to it, the facts upon which the refusal was based."

Bluthenthal v. *Jones*, 208 U. S. 64, 66.

This principle of *res judicata* or estoppel by judgment, is one of the most firmly established.

Troxell v. *D. L. & W. R.R.*, 227 U. S. 434, 440.
Radford v. *Myers*, 231 U. S. 725.
Bates v. *Bodie*, 245 U. S. 520.
Postal Telegraph Cable Co. v. *Newport*, 247 U. S. 464.
Merriam v. *Whittemore*, 5 Gray, 316, 317.
Burlen v. *Shannon*, 99 Mass. 200.
Foye v. *Patch*, 132 Mass. 105, 110.
Edwards v. *Columbia Amusement Co.*, 215 Mass. 125.

The error which it is respectfully submitted the Massachusetts Court has committed, is not in wrongly deciding the petitioners' claim but in misconceiving what that claim was. This is shown by the action of the Court in treating the decision in *Friend* v. *Talcott*, 228 U. S. 27, as applicable. In that case, Talcott, the objecting creditor, failed to defeat the granting of the discharge because the statement relied on to defeat it was one made by Friend, the bankrupt, to a commercial agency and not to the creditor or his representative. Therefore the Bankruptcy Court ruled that inasmuch as no statement had been made to the creditor or his representative, it was immaterial whether the statement made to somebody else was false or not, and therefore, the question of the falsity of the statement was never tried. Under those circumstances, of course, the granting of the discharge did not establish that the statement was not false. In the subsequent suit brought by Talcott, he was not required to show, in order to avoid the discharge under Section 17, that the statement was made to himself or his representative, but could prevail by showing that the statement, made to the commercial agency intended for his reliance, was false. As the issue of the falsity of the statement had never been tried, there was nothing to prevent his showing this falsity. In other words, the issue which had been tried in the Bankruptcy Court was one of law, namely, whether a commercial agency could be said to be a "representative" under Section 14. The issue to be tried in the subsequent suit in the State Court was one of fact, namely, whether the statement was false. Clearly, under these circumstances, as pointed out by Chief Justice White, there was no "identity of cause between the two cases."

After pointing this out, he continues:

> "It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as *nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition.* On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition (p. 41). (Italics not in original.)

In short, in *Friend* v. *Talcott*, the issue of falsity or not had never been tried until it was tried in the subsequent action in the State Court. As there has been no decision that the statement was not false, there was nothing to operate by way of *res judicata* or estoppel. In the case at bar, the question of falsity or not was the issue which had been tried in the Bankruptcy Court, and it had been decided that the statement was not false. There is no reason, whatever, why the principle of estoppel by judgment does not apply. The respondent chose to try that issue in the Bankruptcy Court, and the petitioners prevailed upon it. They have a right to have full effect given to that decision of the United States Court and not to have it overridden by a subsequent decision of the State Court on the same evidence in a suit between the same parties. The District Court of the United States is at least of equal dignity with a jury in the Massachusetts Superior Court, and the Circuit Court of Appeals of the United States is of equal dignity with the Supreme Judicial Court of Massachusetts. As between the United States and the State Courts, the first decision and not the second, is the one which should prevail. There is peculiar reason for this in the case at bar. The falsity in issue was the falsity described in the United States Bankruptcy Act. The meaning of that word is to be determined finally not by the opinion of the State Court but by

the opinion of the United States Court. As determined by United States Courts, "false" — as the term is used in Section 17, Clause 2, of the Bankruptcy Act, excepting from the discharge, liabilities for obtaining property by false pretences or by false representations, — means intentionally, morally wrong and not simply untrue.

Collier on Bankruptcy, 11th edition, pp. 432, 433.
Remington on Bankruptcy, 2d edition, Sec. 2747.
Brandenburg on Bankruptcy, 4th edition, Sec. 1559.
Loveland on Bankruptcy, 4th edition, Sec. 760.

The same was true of the word "fraud" as long as that remained in the act before the amendment of 1903 struck out the requirement of a judgment before bankruptcy.

Bullis v. *O'Beirne*, 195 U. S. 606, 619.
Tindle v. *Birkett*, 205 U. S. 183.
Crawford v. *Burke*, 195 U. S. 176.
Forsyth v. *Vehmeyer*, 177 U. S. 177.
Hennequin v. *Clews*, 111 U. S. 676.
Neal v. *Clark*, 95 U. S. 704.
Re Blumberg, 94 Fed. 476, 479.

The same is true of the word "false" as used in Section 14 (b), defining the grounds for refusing a discharge.

International Tr. Co. v. *Myers*, 245 Fed. 110 (C. C. A. 1st).
Doyle v. *First Nat. Bank*, 231 Fed. 649, 653.
Franklin v. *Monning Dry Goods Co.*, 217 Fed. 929 (C. C. A. 5th).
Peck v. *Lowenbein*, 176 Fed. 178 (C. C. A. 4th).
Gilpin v. *Merchants Nat. Bank*, 165 Fed. 607 (C. C. A. 3d).

In the case at bar, there was no evidence of intention to deceive, no evidence of moral turpitude, and the statement was not contrary to the fact. The statement does not understate the liabilities or overstate the assets. The defendants had accounts receivable amounting to $58,425.06. They do not state that these have not been pledged as collateral security. If they had left out the pledged accounts, then in

order to make their statement show the true balance of their assets, they would have been obliged to leave out the accounts payable to the Commercial Investment Trust for the money advanced. The statement would then have been false as an understatement of their liabilities. The only way in which they could have given the full information would have been to amplify the statement. Their net worth was not overstated. The decision of the Bankruptcy Court (245 Fed. 110), with respect to this — it is submitted — is correct. Everything stated is true. Not only was there no evidence of an intention to deceive, but on the contrary, the defendants testified that they believed that the statement was true and that they had no intention to deceive. Glass, the bookkeeper, called as the plaintiff's own witness, also so testified. There was no evidence to the contrary. Even if the jury had disbelieved their evidence, this negative would not amount to affirmative evidence to the contrary.

White v. *Ely*, 234 Mass. 221.
Phillips v. *Gookin*, 231 Mass. 250.
Pollock v. *Pollock*, 71 N. Y. 137.
Ramsey v. *Ryerson*, 40 Fed. 739.
Morris v. *Talcott*, 96 N. Y. 100.
Jaeger v. *Kelley*, 52 N. Y. 274.
Crook v. *Rindskopf*, 105 N. Y. 476.
Baltimore & Ohio v. *State*, 71 Md. 590.
Shoninger v. *Day*, 53 Mo. Appeals, 147.
Mercer v. *Wright*, 3 Wisc. 645.
Wallace v. *Berdell*, 97 N. Y. 13, 21.
Inhabitants of Wakefield v. *Am. Surety Co.*, 209Mass. 173.
Hyslop v. *Boston & Maine R.R.*, 208 Mass. 362.
Beers v. *Prouty & Co.*, 203 Mass. 254.
Conant v. *Johnston*, 165 Mass. 450.
Morse v. *Hill*, 136 Mass. 60, 70.

The petitioners assert that they have made no false statement. In support of that assertion they point not only to all the testimony in the case, but first and finally, to the decision of the United States Court, which establishes the fact conclusively between the parties to the case at bar. In the light

of that decision, the petitioners had the right to be relieved from trying the same issue again. It should not have been submitted to the jury. On this very issue, due effect has not been given to the decision of the District Court of the United States and of the Circuit Court of Appeals.

Respectfully submitted,

EDWARD F. McCLENNEN,
For the Petitioners.

MYERS ET AL., COPARTNERS AS S. A. & H. MYERS, *v.* INTERNATIONAL TRUST COMPANY.

CERTIORARI TO THE SUPERIOR COURT, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

No. 89. Argued October 18, 1923.—Decided November 12, 1923.

A judgment in bankruptcy confirming a composition over a creditor's objection based on the allegation that the bankrupts had obtained credit by a false statement of their financial condition, is not *res judicata* as to the creditor's cause of action against the bankrupts for the same alleged deceit; but estops the creditor as to the issue of falsity where this was not only raised, but actually decided against him, in the bankruptcy proceedings. *Cromwell* v. *Sac County*, 94 U. S. 351; *Friend* v. *Talcott*, 228 U. S. 27. P. 70.

241 Mass. 509, reversed.

CERTIORARI to a judgment of the Superior Court of Massachusetts, entered on a rescript from the Supreme Judicial Court, and enforcing a verdict, recovered by the present respondent, in a suit against the petitioners for damages for deceit.

Mr. Edward F. McClennen for petitioners.

Mr. John R. Lazenby for respondent.

I. The right of the bank to maintain an action for deceit and misrepresentation was not a provable claim in bankruptcy and hence was not discharged by the confirmation of the composition.

When the International Trust Company made the advances, it had two separate and distinct causes of action: (a) an action of contract founded upon the contractual obligations created by the notes, and (b) an action of tort founded upon the deceit of the Myers in inducing the bank to pay money upon misrepresentations intentionally made.

The Bankruptcy Act recognizes these two distinct causes of action and discharges the debtor from his liability on the contract and denies him the discharge from liability for deceit.

Section 14c provides that the confirmation of a composition discharges debts other than those not affected by a discharge.

Section 14b requires the discharge of the debtor unless he has ". . . (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit."

Section 17, as amended by Act February 5, 1903, c. 487, § 5, and Act March 2, 1917, c. 153, provides that a discharge releases a bankrupt from his provable debts except such as ". . . (2) are liabilities for obtaining property by false pretenses or false representations . . ."

Section 63 defines "provable debts," and the definition does not include actions of tort for false representations.

The meaning of the word "false" as used in these sections of the Bankruptcy Act is that the statement must be not only untrue, but also untrue with an intention to deceive.

No question is raised as to the instruction to the jury by the trial court defining the word "false."

The Bank proved its claim on the notes in the bankruptcy proceedings. It did not prove its right to recover in tort for deceit and misrepresentation. Such a claim is not provable. *Schall* v. *Camors*, 251 U. S. 239; *Talcott* v. *Friend*, 179 Fed. 676; 228 U. S. 27.

The fact that the Trust Company proved its claim on the contracts, the notes, does not affect this right to maintain this action of fraud. *Standard Sewing Machine Co.* v. *Kattell*, 132 App. Div. 539; *In re Menzin*, 238 Fed. 773; *Zimmern* v. *Blount*, 238 Fed. 740; *In re Groodzinsky*,

248 Fed. 753; *Forsyth* v. *Vehmeyer*, 177 U. S. 177; *Crawford* v. *Burke*, 195 U. S. 176; *Frey* v. *Torrey*, 70 App. Div. 166; 175 N. Y. 501.

The debt is expressly excepted from the operation of the discharge by § 17 (2).

The present case is not one where the plaintiff may treat his cause of action as one in assumpsit, electing whether he will treat the fraud as a quasi-contract and waive the fraud, but it is one where there are two separate and distinct rights which give rise to separate and distinct causes of action. *Crawford* v. *Burke*, 195 U. S. 176; *Tindle* v. *Birkett*, 205 U. S. 183. *Kreitlein* v. *Ferger*, 238 U. S. 21, distinguished.

II. The decision of the United States District Court in bankruptcy confirming the composition was not *res judicata* upon the question of fraud.

Section 12d of the Bankruptcy Act requires the confirmation of a composition, provided the alleged bankrupt has not been guilty of any acts which will bar a discharge, and § 14b (3) refuses the discharge if the bankrupt has obtained money or property on credit upon a materially false statement in writing made to "any person" for the purpose of obtaining credit.

Any creditor may object to the confirmation of the composition irrespective of whether the false statement was made to him or to another creditor. *In re Miller*, 192 Fed. 730; *Talcott* v. *Friend*, 179 Fed. 676; *In re Kretz*, 212 Fed. 784.

The jury has found that the statement was intentionally false within the definition of the federal cases construing the Bankruptcy Act.

The petitioners have argued that the Bank had the option of remaining silent in the bankruptcy court as to the fraud and later avoiding the effect of the discharge by showing that the petitioners' liability was for obtaining property by false representations, or of trying out

the issue of fraud in objecting to the discharge in the bankruptcy court.

This argument is clearly unsound and results from confusing the nature of the Bank's rights. It assumes that the Bank had only one claim and that the assertion of that claim in the bankruptcy court eliminated the right to maintain an action for fraud after the granting of the discharge. Further, it assumes that the Bank had the right to avoid the discharge in a subsequent suit on the notes, on the ground that it was a provable debt and a liability for obtaining property by false pretenses under § 17 (2). The Bank, as stated before, had two rights—contract on the notes and tort for fraud. The first was provable. The second was not. If the Bank had merely the one right which allowed it to go into the bankruptcy court, it had a provable claim which was followed by the discharge, but under the statute the bankruptcy court never had and could not have before it the claim founded on the tort.

Further, the damages in the tort action could not be determined until the loss suffered by reason of the tort was fixed by the dividend received in the bankruptcy proceedings.

There was no such election and waiver as the petitioners argue. *Friend* v. *Talcott*, 228 U. S. 27, 37, 38.

Neither is it a case of one wrong with an election of remedies. *United States* v. *Oregon Lumber Co.*, 260 U. S. 290.

In the present case the proving of the notes was the affirmation of the contract and the bringing of suit in tort was a second affirmation and seeking damages for the injury caused by reason of the fraud. The right to object to the discharge arose out of the right to prove the notes and was entirely incidental thereto.

Nor can the doctrine of estoppel have any application.

The parties in the bankruptcy proceedings are not the same as the parties in this suit. It was the bankrupt

estate against the bankrupt and not one individual creditor against the bankrupt. *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.*, 227 U. S. 434; *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464. *Bates* v. *Bodie*, 245 U. S. 520, distinguished.

The question at issue is not the same. The sole question in the bankruptcy proceedings was whether the debtor should be discharged from his provable debts, not whether any particular debt was discharged.

The Bankruptcy Act itself brings the two rights out clearly. Section 14b(3) requires that the false statement shall be in writing, but § 17a provides that a discharge shall not release the bankrupt from liability for obtaining money by false representations even though the statement is not in writing.

Friend v. *Talcott*, 228 U. S. 27, is decisive. The facts are almost identical with the facts in the present case. *In re Menzin*, 238 Fed. 773; *Pell* v. *McCabe*, 256 Fed. 512; *In re Groodzinsky*, 248 Fed. 753; Corpus Juris, Bankruptcy, p. 400; Collier, Bankruptcy, 1921 ed., p. 406; Remington, Bankruptcy, 2d ed., p. 2493, § 2750¾; Foster, Federal Practice, 5th ed., vol. II, pp. 2254, 2256.

MR. CHIEF JUSTICE TAFT delivered the opinion of the Court.

This action was begun in the Superior Court of Massachusetts by the International Trust Company, a bank, against Samuel A. and Harry Myers, brothers and partners, for damages for deceit in that the defendants had obtained credit from the Trust Company by a false statement of their financial condition. The action resulted in a verdict for $14,304.49. The amended answer of the defendants pleaded *res judicata* in the cause by a decree of the United States District Court for Massachusetts in bankruptcy, and on the trial the defendants offered the record therein as evidence of an estoppel by judgment

against the plaintiff as to the fact of falsity. The trial court excluded the record. The case was taken by bill of exceptions to the Supreme Judicial Court, which overruled the exceptions and sent down the rescript and pursuant thereto final judgment was entered on the verdict. The Massachusetts courts held that the bankruptcy proceedings neither were *res judicata* as to the cause nor estopped the plaintiff as to the fact of falsity. The case here turns on the effect of the bankruptcy record, and so presents the federal question whether full faith and credit was given to the judgment of a federal court. *Radford* v. *Myers*, 231 U. S. 725, 730; *National Foundry & Pipe Works* v. *Oconto Water Supply Co.*, 183 U. S. 216, 233.

In January, 1917, an involuntary petition in bankruptcy was filed against the Myers brothers. They made an offer of composition. A majority of the creditors accepted the offer. The Referee recommended that it be confirmed. The Myers brothers applied for confirmation. The International Trust Company entered its appearance as a creditor and opposed the confirmation on the ground, among others, that the Myers brothers had obtained loans from the Trust Company by the statement made in writing on the first day of January, 1916, that the accounts receivable amounted to $58,425.06; that the statement was materially false and was made for the purpose of obtaining certain aforesaid sums on credit "said falsity being that the alleged bankrupts concealed and omitted to set forth in said statement the fact that of the said accounts receivable a certain portion in the neighborhood of $20,000, the exact sum being unknown to your petitioner, had been assigned and set over to the Commercial Investment Trust, and, further, that the accounts receivable, as set forth in said statement, did not amount to the sum of $58,425.06". The Referee to whom the objections were referred reported that Myers brothers had made the statement and the Trust Company had relied on

it in making them loans, but that when it was made it was a true statement and correctly set forth the financial condition of the bankrupts on January 1, 1916, as shown by their books kept according to the custom of the bankrupts at that time by an experienced and competent bookkeeper, and he found no evidence that the bankrupts or either of them falsely or purposely concealed or omitted to set forth in said statement the amount of the accounts assigned to the Commercial Investment Company and that the objection could not be sustained. The District Judge (245 Fed. 110) confirmed the finding of the Referee. The International Trust Company carried this ruling on appeal to the Circuit Court of Appeals for the First Circuit, and that court (245 Fed. 110, 112) affirmed the order confirming the composition.

The declaration of the Trust Company in this action for deceit has put the case on the falsity of the same statement of January 1, 1916.

The general principles which must govern here are laid down in an oftquoted opinion of Mr. Justice Field in *Cromwell* v. *Sac County*, 94 U. S. 351. In that case suit had been brought upon coupons attached to bonds issued by the county for the erection of a school house, and it was adjudged that the bonds and coupons were invalid in the hands of one not a *bona fide* holder for value before maturity, and as the plaintiff had not shown himself to be such a holder, he could not recover. In a second suit on other coupons from the same bond, he proved that he was a holder for value before maturity and the county sought to defeat the second suit by pleading the judgment in the first as *res judicata*. It was held that the cause was different and that the first judgment was not a bar. Mr. Justice Field said (pp. 352, 353):

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar

or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . .

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action". See also *Southern Pacific R. R. Co.* v. *United States,* 168 U. S. 1, 50; *Troxell* v. *Delaware, Lackawanna & Western R. R. Co.,* 227 U. S. 434, 440.

Coming now to apply these principles to the case before us, it is very clear that the opposition to the composition in the bankruptcy court was not the same cause of action as the suit for deceit here. That is settled by the decision of this Court in *Friend* v. *Talcott,* 228 U. S. 27, in a case involving similar facts, to be more fully stated. The defense of *res judicata* as to the cause was therefore not established by the judgment confirming the composition.

Counsel for the petitioners, however, urges that in spite of this the bankruptcy record was admissible in evidence. What he contends is that the essential fact found as between the petitioners and respondent in the bankruptcy proceedings and the confirmation of the composition was the truth of, and lack of falsity in, the statement of January 1, 1916, that in the trial of this action for deceit the burden of the Trust Company was to prove the falsity of the statement or fail, and that the Myers brothers were entitled to introduce as evidence conclusively rebutting the Trust Company's evidence of such falsity, the record of the bankruptcy proceedings showing that the question of such falsity in the statement had been adjudged against the Trust Company and in favor of the Myers brothers in a cause to which both were parties and in which the fact of falsity was a relevant and indispensable issue.

In the bankruptcy proceedings after the bankrupts' application was made to confirm the composition, the International Trust Company entered its appearance and filed its specification as it was required to do under General Order XXXII before it could oppose the confirmation and the consequent discharge of the bankrupts. Then followed before the Referee, to whom the issue thus made was referred, what was equivalent to a hearing in equity. This was the beginning of a distinct, separate and new suit. *In re Guilbert*, 154 Fed. 676; *In re Amer*, 228 Fed. 576. This suit between respondent and petitioners was decided by the Referee and the two courts against the respondent and the composition was confirmed because it was found that the statement of January 1, 1916, was true and not false. This is exactly the same issue which arose in the suit for deceit which is before us. Recovery of the judgment under consideration can not be sustained except upon the finding that the statement was false. The respondent, the Trust Com-

pany, can not litigate again that issue in this case, because it is bound by the finding against it in its opposition to the confirmation of the composition. This follows necessarily from the rule in the second class of cases laid down by Mr. Justice Field in the language already quoted.

An adjudication of bankruptcy, or of discharge therefrom, is a judgment *in rem* and is binding on, and *res judicata* as to, all the world, only in respect of the status of the bankrupt, and is not conclusive as to the findings of fact or subsidiary questions of law on which it is based except as between parties to the proceedings or privies thereto. *Gratiot State Bank* v. *Johnson*, 249 U. S. 246, 248; *Manson* v. *Williams*, 213 U. S. 453, 455; *In re Henry Ulfelder Clothing Co.*, 98 Fed. 409, 413; *In re Schick*, 2 Ben. 5—Fed. Cases, No. 12,445. Here the International Trust Company was a real party to the issue and conducted the litigation. While the creditors whom it represented on the question of the discharge were only concluded as to the status of the bankrupt, it was estopped as between itself and the bankrupts in respect of the relevant facts determined in the controversy exactly as if the proceeding in opposition to the composition and discharge had been an ordinary civil suit by it against them.

The respondent however contends, and the Supreme Judicial Court of Massachusetts held, that this case is controlled upon this point, as well as in respect to general defense of *res judicata*, by *Friend* v. *Talcott*, 228 U. S. 27, and must be affirmed on the authority of that case. That was a case like this in which a creditor, having opposed a composition in bankruptcy, was defeated in his effort and brought suit in tort for deceit for damages equal to the balance of his claim after deducting what he had received on his provable claim for goods sold. The deceit alleged in the specification was a false report of

financial condition of the bankrupt made to a commercial agency whose report the opposing creditor relied on. The bankruptcy court held that these facts thus alleged did not bring the case within paragraph (3) of § 14b of the Act of July 1, 1898, c. 541, 30 Stat. 550, as amended by Act of February 5, 1903, c. 487, § 4, 32 Stat. 797, which provided that "the judge shall hear the application for a discharge, and such proofs and pleas as may be made in opposition thereto by parties in interest, at such time as will give parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application and discharge the applicant unless he has . . . (3) obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit." It confirmed the composition. The reasoning of the bankruptcy court was that paragraph (3) required that the materially false statement, to be effective to prevent a discharge, should be made directly to the creditor or his representative whom the debtor intended to deceive and that as the specification only showed a statement made to a commercial agency, it did not aver facts sufficient to constitute a bar to the composition and the bankrupt's discharge.

A year later the creditor began his action for deceit. In addition to the general issue, the defendants and former bankrupts set up the above judgment as *res judicata*. In the District Court the cause was heard on this plea of former adjudication and the plea was sustained. The Circuit Court of Appeals held that the defense of *res judicata* was not sustained and reversed the judgment of the District Court.

This Court held that the causes of action were not the the same, that the first concerned the general discharge of all the creditors under one section, and the second the exception from such general discharge of a particular

creditor under another section and that the defense of former adjudication was bad.

Coming then to the question of estoppel by judgment on the issue of fact as to the deceit, Chief Justice White, speaking for the Court, used this language:

"It is elaborately argued, however, that whatever be the infirmity of the decree of confirmation as *res judicata* in the complete sense, that decree was necessarily binding in so far as it established relevant facts which were at issue between the parties and therefore is here conclusive. But the proposition rests upon an unfounded assumption, as nothing in the assertion of the right to be exempt from the operation of the discharge here relied upon involves a traverse or denial of any relevant fact established as a result of the approval of the composition. On the contrary, as we have seen, the facts here relied upon to establish the exemption from discharge, are the facts which were conceded to exist and were not traversed for the purpose of the hearing on the composition."

The Court thus points out that the issue of material falsity of statement was not an issue of fact in the bankruptcy court, because that court had held that even if the fact of falsity as alleged in the specification of opposition were conceded, it did not prevent the confirmation of the composition and discharge under (3) § 14b of the Bankruptcy Act, because the statement was not made to the creditor or his representative, whereas the right of the creditor to recover in the action in hand was based on an exception to the discharge under the 17th section of the Bankruptcy Act of a liability "for obtaining property by false pretenses or false representations," (Amendment of February 5, 1903, c. 487, § 5, 32 Stat. 798,) without any restriction as to whom the representation should be made. In other words, the exact point upon which the suit for deceit depended, to wit, the falsity of the statement, was not considered and passed on by the bank-

ruptcy court. That court without enquiring as to the truth of the statement held as matter of law that it could not prevent the composition.

Nor does that which follows the above quotation help respondents. It had evidently been argued that the view of the bankruptcy court as to the limitation of (3) § 14b was erroneous and that the issue of deceit was necessarily before it and so in the result was decided. This led the Chief Justice to say (p. 41):

"Conceding for the sake of argument that the facts which were alleged as the basis of the opposition to the approval of the composition were sufficient, had the law been rightly applied, to have prevented the approval of the composition, such concession would afford no ground for holding that because one case in matter of law was erroneously decided, that such decision should conclusively establish the duty to erroneously decide another and distinct case."

This of course is to be applied to the facts of the case. The question of law whether the statement had to be made to the creditor or his representative only, under (3) § 14b of the Bankruptcy Act, did not arise in the second case at all for, as said above, that involved only the meaning of § 17 which had no such words of limitation. The circumstance that the bankruptcy court may have erroneously declined to decide the question of falsity could not give its action in avoiding decision of it the same conclusive effect as if it had decided it, in a subsequent action between the same parties in which the reason for avoiding it however erroneous did not exist. The Chief Justice continued (p. 42):

"If on the other hand, it be conceded that the composition was rightfully approved, as the determination of that subject did not under the very terms of the statute involve passing upon the separate and distinct claim of creditors to be exempt from the operation of the discharge, it results

that in no view of the case is there merit in the contention as to *res judicata*."

This was only to say that the issue of falsity in (3) of § 14b, if rightly construed by the bankruptcy court, was not the same as that in § 17.

The distinction between that case and this then is clear. The whole and sole effect of the decision in *Friend* v. *Talcott* was, first, that the judgment confirming the composition and discharge, based on (3) of § 14b, was not the same cause of action as that in the action for deceit based on § 17, and therefore that it did not estop the creditor from obtaining a judgment in the latter suit, and, second, that the issue of the falsity of the statement, while essential to recovery in the second suit for deceit, was not essential to the judgment in bankruptcy as held by the court which rendered the judgment and was in fact not determined by that court. In the case before us, however, we find that the issue of the statement's falsity was the same and was controlling in both suits and that, because it was decided against the Trust Company in the first suit, the decision concludes the issue against the company in the second. It was error, therefore, to exclude from the evidence the record of the bankruptcy judgment on the composition

The judgment is reversed and the case is remanded for further proceedings not inconsistent with this opinion.